SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 318

GREAT LAKES AIRLINES, INC., CURREY AIR TRANSPORT LIMITED, IRVING E. HERMANN and IDA MAE HERMANN, individually and as co-partners, d/b/a NEVADA AERO TRADES COMPANY, AIR INTERNATIONAL, INC., GREAT LAKES AIRLINES AGENCY, INC., SKYCOACH AGENCY OF NEVADA, INC., SKYCOACH AIRLINES AGENCY OF NEW YORK, INC., SKYCOACH AIRLINES AGENCY OF CHICAGO, INC., SKYCOACH AGENCY OF LOS ANGELES, INC., SUPER SKYCOACH AIRLINES AGENCY, INC., SKYCOACH AIRLINES AGENCY OF DETROIT, INC., and SKYCOACH AGENCY OF SAN FRANCISCO, INC., PETITIONERS,

vs.

CIVIL AERONAUTICS BOARD OF THE UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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vs.

CIVIL AERONAUTICS BOARD OF THE UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on May 4, 1961.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals, printed in Appendix A attached hereto, has not yet been officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1961. A petition for rehearing was denied on June 15, 1961. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1) and Section 1006(f) of the Federal Aviation Act of 1958, 49 U.S.C. Section 1486(f).

STATUTES INVOLVED

The pertinent provisions of the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. Section 1301 *et seq.;* the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. Section 1001 *et seq.;* and various relevant regulations promulgated by the Civil Aeronautics Board are set out in Appendix B attached hereto.

QUESTIONS PRESENTED

The Civil Aeronautics Board entered an order at the conclusion of an administrative proceeding revoking licenses to engage in air transportation of two of the petitioners and requiring all of the petitioners to cease and desist from engaging in air transportation and from violating Section 408 of the Civil Aeronautics Act (49 U.S.C. § 1378). A regulation of the Board, applied at the administrative hearing, precludes the issuance of subpoenas for the attendance of Board personnel at adjudicatory hearings, and requires that a party seeking the testimony of such personnel shall file an application with a Hearing Examiner which shows both "the need of the moving party for such evidence and its relevancy to the issues of the proceeding." An application by Petitioners for the attendance of certain Board employees who had investigated the activities of Petitioners was denied in the present case under this regulation. The Hearing Examiner also denied a motion by Petitioners to recall certain Board investigators who had testified concerning Peti-

tioners' activities before the decision in *Jencks* v. *United States*, 353 U.S. 657, and the Jencks Act (18 U.S.C. § 3500), so that a foundation could be laid for demanding production of reports by the investigators relating to their testimony.

The questions presented are as follows:

1. Whether a regulation by an administrative agency (the Civil Aeronautics Board) which bars private parties from obtaining subpoenas for the attendance of agency employees at an adjudicatory hearing, and which requires a showing by the movant of both "need" and "relevancy" as a precondition to obtaining the appearance of agency personnel, is consistent with Section 6(c) of the Administrative Procedure Act which provides that agency subpoenas shall be issued upon request or upon a mere showing of the "general relevance and reasonable scope of the evidence sought?"

2. Whether Petitioners' rights, pursuant to the principles of *Jencks* v. *United States*, 353 U.S. 657, and the "Jencks statute" (18 U.S.C. § 3500), as applied to administrative hearings, to inspect reports relating to the testimony of administrative agency investigators who were called as witnesses by the Board's prosecuting division, were aborted in the present case by rulings of the Hearing Examiner?

3. Whether Petitioners' rights to a fair hearing consistent with due process were infringed in the present case (i) by refusal of a Hearing Examiner to require the attendance as witnesses at an administrative hearing of agency employees who had investigated Petitioners, and (ii) by refusal of a Hearing Examiner to require agency employees to testify in order that a foundation could be laid for a motion to produce reports relating to the testimony of these employees?

4. Whether an order of the Civil Aeronautics Board forbidding Petitioners (i) from engaging in aviation activities, even though such conduct would be lawful apart from the Board order involved in the present case, and (ii) from engaging in overseas and foreign air transportation, there being no evidence in the record respecting infractions by Petitioners of the statutes or regulations applicable to overseas, and foreign air transportation, was unduly broad and punitive?

STATEMENT

1. SUMMARY STATEMENT OF THE PROCEEDINGS

The Civil Aeronautics Board issued an order at the conclusion of an administrative enforcement proceeding revoking the operating authority of two of the Petitioners (Great Lakes Airlines and Currey Air Transport) and directing all of the Petitioners to cease and desist from engaging in air transportation and from violating a provision of the Act (Section 408, 49 U.S.C. § 1378) which prohibits mergers and control relationships without Board approval.

The Petitioners (Respondents in the administrative proceeding) are two air carriers (Great Lakes and Currey), each licensed by the C.A.B. to furnish irregular air service;[1] two individuals, Irving E. Hermann

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[1] Great Lakes is registered with the Board as a large irregular carrier and holds letter of registration No. 810 issued to it on August 12, 1947 (Tr. 2). Currey holds an individual exemption as an irregular transport carrier issued by the Board on March 16, 1951 (Tr. 3). "Large irregular carriers" are carriers who utilize an aircraft of more than 12,500 pounds maximum certificated take off weight in connection with supplemental air service. (14 C.F.R. § 291.1 (1961 Supp.). "Irregular" carriers, designated as "supplemental carriers" in 1955, were formerly referred to as "non-scheduled" carriers. See Comment, *Adequacy of Domestic Airline Service: The Community's Role in a Changing Industry*, 68 Yale L.J. 1199, 1213-14, n. 73 (1959).

and his wife, Ida Mae Hermann; several service companies engaged in leasing planes and parts, purchasing gasoline, and banking operations; and seven ticket agencies who did business under the name "Skycoach."

The proceeding was initiated by a complaint filed with the Board on October 14, 1954, by the Bureau of Enforcement (Tr. 1,2). Petitioners were charged with various violations between 1952 and 1954 of provisions of the Civil Aeronautics Act [2] and of economic regulations promulgated by the Board.[3] In substance, the Bureau of Enforcement charged (i) that Petitioners had held themselves out as engaging in and that they had engaged in frequent and regular air transportation service, although authorized only to furnish infrequent and irregular service; (ii) that they had entered into various control relationships without Board approval; (iii) and that they had violated various Board regulations respecting ticket agency agreements and ticketing procedures.[4] No complaint was made with respect to the safety or the quality of the transportation service offered and fur-

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[2] The Civil Aeronautics Act of 1938 (52 Stat. 973, 49 U.S.C. § 40 *et seq.*), in force at the time the proceeding was commenced, was superseded on December 31, 1958, by the Federal Aviation Act (72 Stat. 737, 49 U.S.C. § 1301 *et seq.*). No change was made, however, in the pertinent statutory provisions, and in the interest of convenience the citations in this petition are to the Federal Aviation Act.

[3] Petitioner Great Lakes was also charged with violating a 1952 cease and desist order (C.A.B. Order No. E-6748, Docket 4161, August 28, 1952).

[4] Petitioners were alleged to have violated Sections 401(a), 408, and 1005(e) of the Federal Aviation Act, 49 U.S.C. §§ 1371(a), 1378, and 1485(e), and the following Board economic regulations: Sections 291.23, 291.24 (14 C.F.R. 1956 Edition) and former § 242.5(b)(4) (14 Fed. Reg. 35 (1949)).

nished. The relief sought was an order revoking the operating authority of Petitioners Great Lakes and Currey and directing the other Petitioners to cease and desist from engaging in air transportation, directly or indirectly, and from violating Section 408 (Tr. 16-17).

Petitioners filed an answer in which they generally denied the charges. In addition, Petitioners interposed various affirmative defenses.[5]

Following the conclusion of the administrative hearing, the Board Hearing Examiner issued an Initial Decision in which he found in substance that Petitioners had committed the various violations charged (Tr. 244). He recommended that the relief sought by the Bureau of Enforcement should be granted.

On review, the Board issued an opinion affirming the Examiner's findings and conclusions (App. p. 32a). Save for minor modifications, the Board "agree[d] with and adopt[ed] as our own . . . the findings and conclusions of the Examiner" (App. p. 35a). The Board simultaneously issued an order which (i) revoked the operating authority of Great Lakes and Currey; (ii) ordered all of the Petitioners to cease and desist from

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[5] Petitioners alleged, among other defenses, (i) that various regulations which Great Lakes and Currey were charged with violating (note 4, *supra*) were invalid for the reason that the regulations modified the operating authority of the carriers but had been adopted without requisite notice and hearing; (ii) that various challenged acts had been carried out pursuant to agreements filed with the Board prior to the complaint, and that, as a matter of administrative practice, such conduct should not be deemed the basis for a revocation order unless the agreements were disapproved by the Board; and (iii) that petitioners had not been afforded an opportunity to achieve compliance before revocation as contemplated by Section 9(b) of the Administrative Procedure Act, 5 U.S.C. § 1008(b).

engaging in air transportation; and (iii) ordered all of the Petitioners to cease and desist from violating the provisions of Sections 401 and 408 of the Act (49 U.S.C. §§ 1371, 1378), and various regulations and orders of the Board (App. p. 59a).

On appeal, this order was affirmed by the Court of Appeals for the Ninth Circuit.[6]

2. THE ADMINISTRATIVE PROCEEDING: THE PROCEDURAL ISSUES

There was a sharp conflict in the testimony before the Hearing Examiner with respect to the substantive issues. These issues were resolved adversely to Petitioners and are not involved in this petition. Petitioners submit, however, that their procedural rights were violated in the circumstances which are discussed below.

(i) Petitioners' Efforts to Secure the Appearance of Board Employees as Witnesses

Petitioners asked the Hearing Examiner to issue *subpoenas ad testificandum* addressed to eight C.A.B. employees (App. p. 46a). The Examiner refused to is-

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[6] The present case was before the Court of Appeals and this Court at an earlier stage in the proceeding. *Civil Aeronautics Board* v. *Hermann*, 353 U.S. 322.

During the October 1960 term, this Court denied a petition for certiorari by a number of carriers including two of the present petitioners, Great Lakes and Currey, who sought review of a judgment by the Court of Appeals for the District of Columbia Circuit. *Great Lakes Airlines Inc., et al* v. *Civil Aeronautics Board*, No. 918 (June 19, 1961). A petition for reconsideration is presently pending before the Court. Number 918 arose out of a different Board proceeding from the one involved here. Number 918 involves four carriers; the present case involves not only carriers, but individuals, ticket agencies, and others. In short, Number 918 involves other parties, a different form of relief, and different questions from those presented here.

sue the subpoenas on the ground that an administrative regulation of the Board prohibits the issuance of subpoenas to obtain the testimony of Board personnel (Rule 19(g) of the Board's Rules of Practice in Economic Proceedings, 14 C.F.R. § 302.19(g) (1960 Supp.) (App. p. 46a)). Petitioners thereupon filed an application with the Examiner pursuant to Rule 19(g) for an order compelling the attendance of these employees (Tr. 72). Rule 19(g) (quoted in the margin)[7] provides that an application for the attendance of Board personnel as witnesses at a hearing "shall set forth the need of the moving party for such evidence and the relevancy to the issues of the proceeding."

Petitioners sought the testimony of four C.A.B. employees (Stout, Flynn, Walker, and Sullivan) with respect to one of the pivotal issues in the proceeding: whether Petitioners had improperly "held out" regular air service (see App. p. 49a). Among other things,

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[7] "(g) The provisions of this section [which applies to subpoenas] are not applicable to the attendance of Board Members, officers or employees or the production of documentary evidence in the custody thereof at a hearing. Applications therefor shall be addressed to the Examiner in writing and shall set forth the need of the moving party for such evidence and the relevancy to the issues of the proceeding. Such applications shall be processed as motions in accordance with § 302.18 except that a grant of such motion by an Examiner, in whole or in part, shall be immediately reviewed by the Board on its own initiative and shall be subject to final Board action. No application will be required for the attendance of Board personnel or the production of records in their custody when requested by an Enforcement Attorney. Where a Board employee has testified in an enforcement proceeding that he used documents in his custody, or parts thereof, to refresh his recollection, a ruling by the Examiner for their production shall be final in the absence of an objection by the Enforcement Attorney. In the event of such objection, Board review will be limited to the documents, or portions thereof, to which objection is taken by the Enforcement Attorney."

Petitioners wished to establish through these witnesses, who had investigated Petitioners' activities and had testified concerning these activities in behalf of the Bureau of Enforcement (Tr. 649, 661, 696, 846), that Petitioners had discontinued "holding out" regular service. The Hearing Examiner denied the application for an order requiring the attendance of these Board investigators (Tr. 1967-68), and the Board affirmed this ruling on the grounds that if Petitioners "were desirous of showing any change in practice from their previous conduct, they had direct access to their own employees to produce evidence on that point." (App. p. 50a.) In other words, the Board concluded there was no "need" for the testimony of these witnesses.[8] It did not find that the testimony would have been irrelevant.[9]

(ii) Petitioners' Efforts to Secure Reports by Board Witnesses Relating to Their Testimony

Nine Board investigators testified in behalf of the Bureau of Enforcement in January and February, 1955 (App. p. 53a). Petitioners established by cross-examination that one of these employees had prepared a report of his investigation relating to the subject matter of his testimony (Tr. 634-36). The Examiner denied a motion by Petitioners to produce this report on the ground that "My examination of the authorities . . . indicates that as long as he [the witness] did

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[8] The Court of Appeals, in sustaining the Board, also relied upon the view that Petitioners could have called other witnesses to establish discontinuance (App., p. 14a).

[9] Petitioners also applied to the Hearing Examiner for an order requiring the appearance of four other Board employees (Tr. 72). This portion of the application was likewise denied. Petitioners maintained below that this ruling was erroneous, but they do not rely upon the point in connection with this petition.

not use the notes in the hearing room when he testified that he does not have to produce them." (Tr. 637.)

The hearings subsequently were in recess from April 1955 to August 1957 pending the outcome of judicial proceedings in the present case initiated by the Board to enforce administrative subpoenas (see *Civil Aeronautics Board* v. *Hermann*, 353 U.S. 322; App. p. 54a). In the interim, on June 3, 1957, this Court announced, in *Jencks* v. *United States*, 353 U.S. 657, that defendants in criminal proceedings have the right to inspect statements made to government agents by prosecution witnesses. Congress incorporated the principle of *Jencks*, with some modification, into a statute which was approved on September 2, 1957 (71 Stat. 595, 18 U.S.C. § 3500).

In September 1957, after the administrative hearings had resumed, Petitioners, relying on the principle of *Jencks* and the statute, renewed their motions for production of the reports prepared by the Board investigators who had testified (Tr. 1009-1011). The Examiner concluded that, while *Jencks* and 18 U.S.C. § 3500 were not "directly binding," the principle of disclosure *was* applicable to administrative proceedings involving "prosecutions by Government agencies under public laws such as the Civil Aeronautics Act" (Tr. 1058, 1294). Consequently, the Examiner ordered production of the reports of five employee-witnesses (Tr. 1059). The Bureau of Enforcement turned over the reports of one employee; it declined, however, to produce the other reports, and testimony by these witnesses was stricken by the Examiner.[10]

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[10] The Examiner struck only a portion of the testimony of one witness (Flynn) on the ground that the stricken portion was the only testimony which related directly to the foundation which had been laid as a basis for demanding production (Tr. 1136, 1395).

Petitioners then moved that four other investigators who had testified for the Board in 1955 be recalled so that Petitioners could lay a foundation for requesting production of reports by these witnesses (Tr. 1096). There was evidence that it was common procedure for Board investigators to prepare reports (Tr. 635). The Hearing Examiner refused to recall the witnesses for this purpose, on the grounds that Petitioners should have established a foundation for demanding these reports during cross-examination before the recess in September 1955 (Tr. 1099). He rejected Petitioners' claim that the *Jencks* case, decided in 1957, was a "precedent shattering event" and that Petitioners should not be prejudiced because their counsel had not foreseen the outcome of *Jencks* two years before it was decided (Tr. 1101). The Examiner acknowledged that the witnesses were "subject to recall at my discretion" but he "refus[ed] to exercise . . . [his] discretion to call them . . ." (Tr. 1100). The Board and the Court of Appeals affirmed this ruling.

REASONS FOR GRANTING THE WRIT

This case raises basic questions respecting the fairness of the procedure followed by a federal administrative agency in adjudicatory proceedings which culminated in an economic death sentence. *First*, Petitioners' subpoena rights were sharply curtailed under a C.A.B. regulation which cannot be squared with the Administrative Procedure Act. *Second*, their right to inspect the reports of witnesses under the *Jencks* principle was improperly circumscribed. In short, Petitioners were denied a fair hearing in that their right to produce evidence in their own behalf was improperly curtailed and their right to cross examine adverse witnesses was seriously abridged. *Finally*, the Board

entered a sweeping cease and desist order containing provisions for which there is no evidentiary support whatever in the record and which prohibits Petitioners from engaging in aviation activities which would be lawful apart from the order.

A. C.A.B. Rule 19(g) Conflicts With Section 6(c) of the Administrative Procedure Act

The Civil Aeronautics Board has promulgated a Rule of Practice (Rule 19(g), note 7, *supra*) which prescribes a separate and distinct procedure for obtaining the testimony of Board personnel. The Board's Rules provide that subpoenas addressed to individuals not associated with the Board shall be issued by a Hearing Examiner upon the application of any party containing "a statement or showing of general relevance and reasonable scope of the evidence sought." But a different and special rule applies to the attendance of Board personnel whom private parties desire to call as witnesses. Board personnel may not be subpoenaed. A motion must be filed with a Hearing Examiner requesting the attendance of Board personnel, and the applicant must demonstrate "*the need . . .* for such evidence *and its relevancy* to the issues of the proceeding." The Bureau of Enforcement is expressly exempted from these provisions; it is not required to file an application or to make the showing required of private parties who wish to summon Board personnel as witnesses.

Rule 19(g) cannot be reconciled with the Administrative Procedure Act which contemplates that subpoenas shall issue requiring the attendance of any party if the evidence sought is generally relevant and of reasonable scope. Section 6(c) of the A.P.A. (5 U.S.C. § 1005(c)) provides in pertinent part that

> "Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought." [11]

1. The legislative history shows that Section 6(c) was designed to make subpoenas readily available, given a showing of relevance and reasonable scope of the information sought. Thus, Congressman Walter, Chairman of the House Subcommittee which considered the bill, explained to the House that Section 6(c) was intended to enable private parties to secure subpoenas "upon an equality with Government representatives and without any more than a general showing of relevance and reasonable scope of the information sought." (Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 363 (1946).) The Senate Report emphasized that the right to subpoenas was "an indispensable requisite to fair procedure," and it noted that Section 6(c) would "prevent the issuance of improvident subpoenas or *action by an agency requiring a detailed, unnecessary, and burdensome showing of evidence* [sought]." (Emphasis supplied.) (Sen. Doc. No. 248, at pp. 27, 206.) Indeed, Congress refused to approve a bill which contained a requirement of "necessity" as a precondition to the issuance of a subpoena by an administrative agency.[12] The Attorney General's Manual on the Ad-

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[11] Section 7(b) of the A.P.A., 5 U.S.C. § 1006(b), empowers presiding officers to "issue subpenas authorized by law." The C.A.B. is authorized to issue subpoenas by 49 U.S.C. § 1484.

[12] See H.R. 1203, 79th Cong., 1st Sess. (1945) which provided:

> "§ 6(c). Subpoenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure upon a statement of general relevance, *necessity*, or reasonable scope of evidence sought." (Emphasis supplied.)

In the Act, as adopted, the word "necessity" is deleted.

ministrative Procedure Act (1947), prepared as a guide to administrative agencies, likewise makes clear (pp. 67-68) that irrelevance or unreasonable scope are the only legitimate grounds for denying a subpoena.[13]

2. It is plain that by compelling a showing of "need" as well as relevance the C.A.B. has added an exacting requirement for obtaining the testimony of Board personnel which is inconsistent with the A.P.A. The Court of Appeals sought to equate necessity with relevance (App., pp. 7a-8a). But the distinction between relevance or materiality, on the one hand, and necessity, on the other, is a procedural commonplace. Thus, in *Hickman* v. *Taylor,* 329 U.S. 495, the production of documents found to be relevant and material was denied because there had been no showing "of the necessity for the production of any of this material . . ." (329 U.S. at 509).[14]

Under a rule requiring that subpoenas shall issue if the testimony sought is relevant and of reasonable scope, it is immaterial whether the movant can secure the same testimony from other sources. By requiring proof of necessity as a precondition to calling certain

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[13] A leading commentator has stated that

> "The provision [Section 6(c)] retains the previous system of permitting an agency to exercise discretion concerning the grant of subpoenas on behalf of private parties, but only to the extent of 'a statement or showing of general relevance and reasonable scope.' " 1 Davis, *Administrative Law Treatise* 586 (1958).

[14] The distinction is reflected in the Federal Rules of Civil Procedure. Under Rule 26, a person may be examined orally "regarding any matter, not privileged, which is relevant to the subject matter" of the action. But under Rule 34, a movant must establish "good cause" in addition to relevance as a precondition to a documentary discovery order.

prospective witnesses, the Board's rule transgresses the right of a party to present his own case as he sees fit.

3. The C.A.B. itself has acknowledged that relevance and necessity are separate and distinct criteria. Thus, when adopting Rule 19(g), the Board announced it would follow the general policy of making evidence by Board personnel available "(a) if found relevant and of reasonable scope, (b) if there is an adequate showing by the moving party of a need for the evidence requested, and (c) if no other substantial considerations, such as security or the Board's investigative or decisional processes are involved." (Regulation No. PR-22, November 25, 1953, 18 Fed. Reg. 7627 reprinted in Appendix attached hereto at p. 71a). Moreover, the structure of Rule 19 itself reflects the greater burden which must be discharged by private parties to secure the testimony of Board employees. That portion of the rule relating to subpoenas addressed to persons not associated with the Board contains no requirement of "need."

The A.P.A. does not authorize one standard for subpoenas addressed to private parties and another standard for subpoenas directed to agency personnel. Even if the Act be deemed to empower agencies to formulate different standards, it does not authorize an agency to exact a showing of "need" as a precondition to obtaining the appearance of agency employees. If the testimony sought is generally relevant and of reasonable scope, agency personnel are subject to subpoena equally with individuals who are not associated with the government.

4. Rule 19(g) is unique to the C.A.B. No showing of necessity is required for a subpoena by the rules of practice of other major federal regulatory agencies,

such as the Federal Trade Commission, Securities and Exchange Commission, Federal Communications Commission, Federal Power Commission, and National Labor Relations Board.[15] The construction of the A.P.A. by other regulatory agencies is cogent proof that the C.A.B. has adopted impermissible procedures.

5. At the time of its adoption, the Board justified Rule 19(g) as a device for protecting confidential information and the secrecy of the Board's investigative and decisional processes (Regulation No. PR-22, December 25, 1953, App. p. 71a). However, in the present case, no claim has been advanced that Petitioners were seeking to elicit sensitive testimony from any of the Board employees whom they sought to call as witnesses. To the contrary, the record shows that Petitioners were interested only in eliciting testimony respecting certain activities of Petitioners themselves which had been directly observed by the Board's investigators. The Bureau of Compliance acknowledged, with respect to documentary evidence called for by Petitioners, that the Bureau had "never maintained that the national security would be endangered by disclosure of these reports." (Tr. 1063). And

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[15] The S.E.C. and F.T.C. will issue a *subpoena ad testificandum* merely upon request, the procedure specified by Rule 45, F.R.C.P. (See 17 C.F.R. § 201.14 (S.E.C.) and 16 C.F.R. § 3.17 (F.T.C.)). These agencies require a showing of general relevance and reasonable scope for a subpoena *duces tecum* (*ibid.*). The F.C.C. and F.P.C. require a showing of general relevance and reasonable scope as a prerequisite for both subpoenas *ad testificandum* and subpoenas *duces tecum*. See 47 C.F.R. § 1.132 (F.C.C.); and 18 C.F.R. § 1.23 (F.P.C.). The Taft-Hartley Act provides that the N.L.R.B. "shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application." (29 U.S.C. § 161(1).)

the Hearing Examiner observed that "there has been no reason advanced by the Office of Compliance at any time as to why the disclosure of these reports was going to be damaging to the government in any way." (Tr. 1061.)

It is obvious that the Board has chosen an impermissible method for effectuating its objective. A rule requiring the attendance of Board personnel in response to a subpoena, issued upon a showing that relevant testimony would be elicited, would not disrupt administrative processes or lead to the disclosure of confidential information. Objections could be asserted by Board counsel to any question seeking to elicit privileged data, and there would, of course, be no necessity to answer if the objections were well founded. Other agencies, with similar problems of confidentiality, have not found it necessary to impose such serious limitations on subpoena rights.

6. As the present case demonstrates, Rule 19(g) can seriously restrict a party in adducing relevant testimony. In this case, application of the rule prevented Petitioners from demonstrating discontinuance of alleged "holding out" operations through the testimony of Board investigators whom Petitioners could not subpoena. Testimony by Board employees was accorded greater weight than the statements by employees of the Petitioners (see Tr. 277; App. p. 57a). Proof of discontinuance clearly would have been relevant in deciding whether to issue a cease and desist order, or the scope of any such order. Cf. *Stokely-Van Camp Inc.* v. *F.T.C.*, 246 F.2d 458, 462 (7th Cir. 1957); *National Lead Company* v. *F.T.C.*, 277 F.2d 825, 839 (7th Cir. 1955).

In sum, it is plain that Rule 19(g) imposes an obstacle to obtaining relevant testimony that is inconsistent with the liberal right to subpoena which the A.P.A. was designed to safeguard. If the decision below is permitted to stand, administrative agencies will be encouraged to impose highly restrictive conditions on access by private parties to the testimony of agency personnel.

B. Petitioners' Rights to Disclosure of Reports by Witnesses Under the Jencks Rule Were Violated

This case raises important questions relating to the administration of the *Jencks* rule. The Hearing Examiner acknowledged that the *Jencks* principle applies to administrative proceedings (Tr. 1058, 1294), and the point was not controverted by either the Board or the Court of Appeals. There is no doubt that the *Jencks* principle is "one of the fundamentals of fair play required in an administrative proceeding." *Communist Party of U.S.* v. *Subversive Activities Control Board,* 254 F.2d 314, 327 (D.C. Cir. 1958); *N.L.R.B.* v. *Adhesive Products Corp.,* 258 F.2d 403, 408 (2nd Cir. 1958).

However, the Hearing Examiner in the present case refused to allow Petitioners to recall witnesses, who had testified *before* the *Jencks* opinion was announced, in order to establish a foundation for demanding production of reports prepared by these witnesses which related to their testimony. The hearing was still going forward, and the matter could have been speedily resolved. Compare the action by the *N.L.R.B.,* after the *Adhesive Products Corp.* decision, *supra,* of reopening records in pending cases to allow respondents to inspect written statements of adverse witnesses and to cross-examine them. See *N.L.R.B.* v. *Ra-Rich Mfg. Co.,* 276 F.2d 451, 454 (2nd Cir. 1960); see also *N.L.R.B.* v.

American Federation of Television and Radio Artists, 285 F.2d 902 (6th Cir. 1961) (Board confessed error in failing to turn over witnesses' statements to Respondents). The Hearing Examiner in effect penalized Petitioners because they did not foresee the *Jencks* ruling two years before the case was decided. This arbitrary ruling, sustained by the Board and the Court below, handicapped Petitioners in cross-examining and possibly impeaching key witnesses against them.

Although purporting to follow the *Jencks* principle, the Hearing Examiner deviated from it in another significant respect. The Bureau of Enforcement refused to comply with the Examiner's order to produce a report by one of its vital witnesses, but the Examiner struck only a portion of the witnesses' testimony (Tr. 1136, 1394-95). The Examiner reasoned that Petitioners' foundation for demanding production of the report related only to the stricken testimony (Tr. 1395). It is plain that the Examiner confused the rule respecting the foundation necessary as a precondition for demanding a report with the rule governing the consequences which flow from refusal to produce. Petitioners were required to show—and they did show—that the witness had prepared a statement "touching the events and activities" or "relat[ing] to the subject matter as to which the witness ha[d] testified" (*Jencks* v. *United States*, 353 U.S. at 668; 18 U.S.C. § 3500(b)). Once this foundation was laid, the Bureau was required to produce the entire report of the witness. Upon failure to produce the report, the remedy contemplated by the *Jencks* act[16] is that *all* of

[16] The statute (18 U.S.C. § 3500(d)) provides in pertinent part that "If the United States elects not to comply with an order of the Court . . . to deliver to the defendant any such statement, or such portion thereof as the Court may direct, the Court shall strike from the record the testimony of the witness . . ."

the testimony shall be stricken for the reason that the opportunity to cross examine has been fundamentally impaired.

C. The Board's Order Was Unduly Broad and Punitive

The Board's order affirmed by the Court of Appeals provides that all of the Petitioners, "their successors and assigns, all both collectively and individually, cease and desist from engaging directly or indirectly in air transportation within the meaning of Section 1(10) and 1(21) of the Federal Aviation Act of 1958" (App. p. 60a). The statutory provisions referred to define air transportation as including interstate, overseas, and foreign air transportation.

The charges and the evidence before the Board related solely to interstate air transportation. There was no evidence whatever with respect to overseas or foreign transportation.

The sweeping scope of the order was, therefore, unwarranted. In *Communications Workers of America* v. *N.L.R.B.*, 362 U.S. 479, 480-81 (1960), the Court stated with reference to an N.L.R.B. order: "Petitioners were not found to have engaged in violations against the employees of any employer other than Ohio Consolidated and we find neither justification nor necessity for extending the coverage of the order generally by the inclusion of the phrase 'any other employer' . . . We therefore conclude that the inclusion in the order of the words 'or any other employer' was unwarranted and the order is modified by striking the same therefrom." By parity of reasoning, Petitioners here were not found to have engaged in violations of the statute or regulations relating to overseas or foreign transportation and there was no justification for an order with respect to that issue. Petitioners should not be

placed under the cloud of a cease and desist order for which there is no evidentiary support and which would seriously impede their activities in the foreign and overseas air transportation field.

The Board order is defective for yet another reason. The order purports to enjoin Petitioners from engaging in air transportation activities which would be lawful apart from the Board order.[17] In effect, the Board order bars Petitioners from the aviation industry even though they comply with all statutes and regulations. The Board has no authority to impose so drastic a penalty.

CONCLUSION

Petitioners pioneered in the development of inexpensive coach air service.[18] If the Board order becomes effective, their businesses will be wiped out. In a proceeding involving such extreme sanctions, it is important, as Lord Chief Justice Goddard observed, that "justice must not only be done but must manifestly be seen to be done." (Rex v. Bodmin J. J., [1947] 1 K. B. 321, 325.) Certainly, the denial to Petitioners of the right to call witnesses in their behalf and the restriction on effective cross examination arising out of the refusal to allow Petitioners to examine reports prepared

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[17] Compare Paragraph 3 of the Board order which enjoins Petitioners from "engaging . . . in air transportation within the meaning of Sections 1(10) and 1(21) of the Federal Aviation Act of 1958" with Paragraph 4 which enjoins Petitioners "from engaging in air transportation *in violation of the provisions of Section 401 (a)* of the Act." (App., p. 60a). (emphasis supplied)

[18] The long controversy with respect to the status of supplemental air carriers is concisely summarized in a statement of C.A.B. Chairman Alan S. Boyd relative to S. 1969 before the Aviation Subcommittee of the Senate Commerce Committee, June 26, 1961.

by key adverse witnesses are not consistent with that principle.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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DATED: August 15, 1961

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APPENDIX A

Opinion of Court of Appeals

UNITED STATES OF AMERICA CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Docket No. 6908

GREAT LAKES AIRLINES, INC. *Et Al.*

Decided: September 28, 1959

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 16,672

GREAT LAKES AIRLINES, INC., et al., *Petitioners,*

vs.

CIVIL AERONAUTICS BOARD OF THE UNITED STATES, *Respondent.*

May 4, 1961

Petition to Review an Order of the
Civil Aeronautics Board

Before: HAMLEY, HAMLIN and MERRILL, Circuit Judges

HAMLEY, Circuit Judge:

This is a petition to review an order of the Civil Aeronautics Board entered at the conclusion of an administrative enforcement proceeding. The petitioners are two air carriers (Great Lakes Airlines, Inc., and Currey Air Transport, Ltd.), Irving E. Hermann and Ida Mae Hermann, his wife, and several service companies and ticket agencies, all respondents in the enforcement proceeding. Several other respondents were dismissed from that proceeding and are not petitioners here.

The administrative proceeding was instituted on October 14, 1954, by the Board's bureau of enforcement, formerly called the office of compliance. In the bureau's complaint filed on that day petitioners were charged with the knowing and willful violation of certain provisions of the Civil Aeronautics Act, administrative regulations and a Board order.[1]

The acts allegedly constituting these violations were of the following five kinds: (1) The two air carriers, each holding authority to conduct only infrequent and irregular operations between any two points, actually held out and provided a regular and frequent transcontinental service; (2) the two carriers together with respondent ticket agencies and service companies, all under the common control and management of the Hermanns, held out and conducted regular operations as a single integrated carrier, which carrier lacked authority to engage in air transportation; (3) petitioners entered into various control relationships without Board approval; (4) petitioners disregarded the prohibition against combining the operations of irregular carriers in order to effect a regular service; and (5) petitioners did not comply with certain ticket agency requirements which were designed to forestall various abuses.

The relief sought by the bureau of enforcement was an order revoking the licenses of Great Lakes and Currey to engage in air transportation and requiring all petitioners

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[1] The Civil Aeronautics Act of 1938, 52 Stat. 977, 49 U.S.C.A. §§ 401-705, was superseded on December 31, 1958, by the Federal Aviation Act of 1958, 72 Stat. 737, 49 U.S.C.A. §§ 1301-1542. The 1958 act made no change in the provisions here relevant. References herein will be to the Federal Aviation Act. The particular statutory provisions petitioners were alleged to have violated are sections 401(a), 408 and 1005(e) of the act, 49 U.S.C.A. §§ 1371(a), 1378 and 1485(e). The regulations alleged to have been violated are sections 291.23, 291.24 (14 C.F.R. 1956) and former section 242.5(b)(4) (14 Fed. Reg. 35 (1949)) of the Board's economic regulations. The Board order petitioners were alleged to have violated is Order No. E-6748, Docket 4161, August 28, 1952.

to cease and desist from engaging in air transportation, directly or indirectly, and from violating section 408 of the Civil Aeronautics Act.

Hearings were held before a hearing examiner of the Board from January through April 1955. The hearings were then in recess until August 1957, pending proceedings brought by the Board against petitioners to enforce administrative subpoenas. The outcome was a court order enforcing the subpoenas. See Hermann v. CAB, 9 Cir., 237 F.2d 359, rev'd *sub nom.* CAB v. Hermann, 353 U. S. 322.[2]

The hearings were resumed in August 1957 and continued through December of that year. The examiner issued his initial decision on January 19, 1959. He found that petitioners had knowingly and willfully violated the statutory provisions, and the regulations and previous order of the Board by their acts as described above. It was his conclusion that all the relief sought by the bureau of enforcement should be granted.

Petitioners filed exceptions to the initial decision, and argument was had before the Board on May 6, 1959. The Board issued its order on September 28, 1959. The findings and conclusions of the examiner were for the most part

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[2] In addition to CAB v. Hermann, noted above, the Board initiated another court proceeding in the United States District Court for the Southern District of California to enforce a subpoena served upon Gladys Shepherd. Such an order was obtained.

Petitioners have initiated several court actions involving aspects of this administrative proceeding, as listed in an appendix to the examiner's initial decision. Among these was a suit brought on January 17, 1955, in the United States District Court for the District of Columbia for an injunction against further administrative proceedings in this case. Great Lakes v. Chan Gurney, Civil No. 2095-55, D.D.C., January 17, 1955. The district court denied the petition for injunction and granted the Board's motion to dismiss. The Court of Appeals for the District of Columbia denied a motion for an injunction pending an appeal from the district court order. No. 12,567, C.A.D.C., February 21, 1955.

adopted. Consistent therewith, the Board's order revoked the licenses of Great Lakes and Currey to engage in air transportation. In the same order all petitioners were required to cease and desist from engaging in air transportation, directly or indirectly, and from violating section 408 of the act.

Petitions for rehearing, reargument and reconsideration, and for a stay of the order of September 28, 1959, pending judicial review were denied on November 10, 1959. The instant petition for review was filed in this court on November 14, 1959.[3] We have jurisdiction under 49 U.S.C.A. § 646(a), and venue is proper under 49 U.S.C.A. § 646(b). We stayed the Board order of September 28, 1959, pending disposition of this petition for review.

In seeking to set aside the Board order, petitioners first advance several arguments with regard to the appearance of Board employees as witnesses.

On November 12, 1957, counsel for petitioners presented to the examiner subpoenas *ad testificandum* calling for the appearance as witnesses of eight Board employees.[4] The examiner immediately declined to issue the subpoenas. He did so on the ground that the provisions of rule 19(g) of the Board's procedural regulations were controlling and the procedure set forth in that rule must be followed.[5]

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[3] After the petition for review was filed in this court petitioners on November 21, 1959, filed a motion with the Board to take depositions or to reopen the hearing to receive additional evidence. The Board denied this motion on December 8, 1959, and on February 5, 1960, denied a petition for reconsideration of the latter order.

[4] Alphonse M. Andrews, James Saltzman, William Sullivan, John B. Flynn, Joseph Stout, Eleanor S. Walker, Robert Burstein and James Anton.

[5] At the time of the hearing rule 19(g) read as follows:

> "The provisions of this section [which applies to subpoenas] are not applicable to the attendance of Board members, officers or employees or the production of documentary evidence in the

While petitioners were thus required to follow the rule 19(g) procedure, the bureau did not follow that procedure with respect to the ten Board employees whom it called as witnesses. Petitioners argue that it was therefore improper for the examiner to receive the testimony of Board employees called by the bureau and the documents introduced in connection with their testimony.

In support of this argument petitioners point out that in the Board's discussion of rule 19(g) at the time of its adoption the statement was made that "[T]he Board does not intend to deprive *parties* of the opportunity to request, in appropriate situations, the testimony of Board personnel . . . ." (Emphasis supplied.)[6] Rule 9 of the Board's Rules of Practice provides that "The term party wherever used in this part shall include . . . the Compliance Attorney in any proceeding." 14 C.F.R. § 302.9 (1956). Petitioners also call attention to the fact that rule 19(g) was subsequently amended to provide that "No application will be required for the attendance of Board personnel or the production of records in their custody when requested by a Compliance Attorney."[7] It is argued from this that prior to the amendment of rule 19(g) the Board's enforcement attorney was subject to that rule.

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custody thereof at a hearing. Applications therefor shall be addressed to the Examiner in writing and shall set forth the need of the moving party for such evidence and its relevancy to the issues of the proceeding. Such applications shall be processed as motions in accordance with § 302.18 (Rule 18), except that the grant thereof by an Examiner, in whole or in part, shall be immediately reviewed by the Board upon its own initiative and shall be subject to final Board action." 18 Fed. Reg. 7627 (1953) (amended by CAB Procedural Reg. No. 30, 22 Fed. Reg. 10438 (1957), as amended, 14 C.F.R. §302.19(g) (1960 Supp.))

[6] CAB Procedural Reg. No. 22, adopted November 25, 1953, 18 Fed. Reg. 7625 (Dec. 1, 1953); 14 C.F.R. § 302.19(g) (1956).

[7] CAB Procedural Reg. No. 30, adopted December 16, 1957, effective Janaury 1, 1958, 14 C.F.R. § 302.19(g) (Supp. 1960).

Rule 19 is entitled "Subpenas." It deals with compulsory attendance and compulsory production of documents. As originally worded, rule 19 contained no specific provision excluding from the application of the rule the testimony of Board personnel or the production of Board documents in economic proceedings. The Board, however, had consistently construed rule 19 in its original form as not applicable to the attendance of Board officers or employees as witnesses or the production of Board records. For the purpose of clarifying the rule in this respect and to provide a procedure whereby the testimony of Board personnel and the production of Board records could be obtained in appropriate situations, subsection (g) was added to rule 19 in 1953.[8]

Rule 19(g) thus specified the procedure to be followed where the compulsory attendance of Board personnel or the compulsory production of Board records was desired. It is improbable that rule 19(g) was intended to afford a procedure available to the enforcement attorney since it would be reasonable to assume that he could always obtain the voluntary attendance of Board personnel. The ten Board employees called as witnesses by the bureau of enforcement attended the hearings and produced records voluntarily. Hence it was not necessary for the bureau to invoke any procedures to compel them to do so, even if the rule 19(g) procedure was then available to the enforcement attorney. Petitioners suffered no prejudice by reason of the fact that Board personnel appeared voluntarily rather than pursuant to rule 19(g) procedure.

The failure of the enforcement attorney to invoke rule 19(g) procedure in obtaining the testimony and documentary evidence submitted by Board personnel did not render that evidence inadmissible.

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[8] This purpose is fully explained in the Board regulation cited at note 6.

Petitioners further argue, however, that rule 19(g) is violative of section 6(c) of the Administrative Procedure Act, 5 U.S.C.A. § 1005(c), relating to the issuance of subpoenas. It was therefore error, petitioners contend, for the examiner to require them to follow the rule 19(g) procedure in an effort to obtain the attendance of Board employees.

It is provided in section 6(c) of the Administrative Procedure Act that "agency subpoenas authorized by law shall be issued to any party upon request, and, as may be required by rule of procedure, upon a statement of showing of general relevance and reasonable scope of the evidence sought." Rule 19(g) requires the applicant to "set forth the need of the moving party for such evidence and its relevancy to the issues of the proceeding."

Thus the rule requires a showing of relevance as the statute provides may be required by rule of procedure. But while section 6(c) provides that procedural rules may also require a showing of "reasonable scope," rule 19(g) requires that the "need" for the evidence be shown.[9]

The showing which must be made in order to obtain favorable action by the examiner under rule 19(g) is essentially that which is contemplated within the terms of section 6(c). If proposed evidence is relevant and within a reason-

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[9] Rule 19(g) also provides that if the examiner grants a rule 19(g) application the same "shall be immediately reviewed by the Board upon its own initiative and shall be subject to final Board action." In adopting the rule the Board announced that in making such a review it would follow the general policy of making such evidence available "(a) if found relevant and of reasonable scope, (b) if there is an adequate showing by the moving party of a need for the evidence requested, and (c) if no other substantial considerations, such as security or the Board's investigative or decisional processes are involved." 18 Fed. Reg. 7627 (1953). But since in this case the examiner denied the rule 19(g) application in toto, no Board review being required, we are not here concerned with whether the Board policy as stated above adds tests violative of section 6(c).

able scope, it is unlikely that it would be rejected as unneeded when the rule 19(g) test is applied. Conversely, if proposed evidence is either irrelevant or goes beyond a reasonable scope within the meaning of section 6(c), it would be irrelevant or unneeded within the context of rule 19(g).[10]

From what is said above we conclude that rule 19(g) is not violative of section 6(c) in any respect that could be prejudicial here. But if the requirements under rule 19(g) do go beyond those permissible under section 6(c), the fact remains that no such improper requirement was imposed in these proceedings. Petitioners' application was denied under rule 19(g) on the grounds of irrelevance and unreasonable scope, the grounds which section 6(c) specifies may call for denial of an application.

After the examiner declined petitioners' request for the issuance of subpoenas to the eight board employees, petitioners applied on November 12, 1957, under rule 19(g), for the attendance at the hearing of these same employees. This application was denied by the examiner on November 20, 1957. Petitioners contend that the examiner erred in this regard, in that competent and material evidence was thereby excluded. Consideration of this argument makes it necessary to consider the testimony petitioners proposed to elicit from the individual Board employees they sought to call.

Petitioners proposed to examine Board officials Burstein and Anton regarding the Board's alleged lack of compliance with section 9(b) of the Administrative Procedure Act, 5 U.S.C.A. § 1008(b) and former rule 204 of the

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[10] In expressing this view we are mindful of the fact that the Board's statement of policy, quoted in footnote 9, refers to reasonable scope and need as if they involved different considerations.

Board's Rules of Practice.[11] In so far as this proposed testimony is concerned, the rule 19(g) application was denied on the ground that the evidence would not have been relevant.

We assume for present purposes, and the Board does not contend otherwise, that if Burstein and Anton had been permitted to testify it would have been established that petitioners were not given prior notice and opportunity to achieve compliance before this administrative proceeding was instituted, as purportedly then required by section 9(b) and rule 204. The underlying issue thus is not whether there was abuse of discretion in denying this part of the rule 19(g) application, but whether the entire order under review is void for noncompliance with section 9(b) and rule 204.

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[11] Section 9(b) reads in relevant part:

> "Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements."

Rule 204 then read:

> **"Satisfaction of formal complaint.** Prior to the institution of an enforcement proceeding pursuant to § 302.205, the person complained against in a complaint submitted pursuant to § 302.201 shall be afforded an opportunity for the submission of facts, offer of settlement or proposal of adjustment, unless time, the nature of the grounds of the complaint, or the public interest will not permit. This opportunity shall be extended in writing and shall be accompanied by a copy of the complaint. Responses to such opportunities shall also be in writing and shall be submitted to the Board within fifteen (15) days after notice of complaint." 17 Fed. Reg. 3029 (1952) (amended by CAB Procedural Reg. No. 30, 22 Fed. Reg. 10438 (1957), as amended, 14 C.F.R. § 302.204 (1960 Supp.)).

By its terms rule 204 then applied only with regard to proceedings based on rule 201 (17 Fed.Reg. 3020 (1952), as presently amended, 14 C.F.R. § 302.201 (1960 Supp.)) complaints. Rule 201 complaints are those filed by third parties, as distinguished from complaints verified by the enforcement attorney. This is made clear by rule 205 (now 14 C.F.R. § 302.206 (1960 Supp.)) which specifies that the petition for enforcement shall be accompanied by either a complaint submitted under rule 201 or one verified by the enforcement attorney. The instant proceeding is not based on a third-party complaint, and rule 204 was therefore inapplicable.

Section 9(b) contains several exceptions, one being that the procedures therein prescribed need not be followed in the case of "willfulness" in connection with the conduct which may warrant license revocation or other sanctions. The procedures prescribed in section 9(b) are to be put into operation prior to the institution of agency proceedings leading to the imposition of sanctions. It follows that the "willfulness" exception applies here only if the bureau at the time it filed the complaint had reasonable grounds to believe that the alleged violations were knowing and willful.

The examiner made and the Board adopted the finding as to willfulness set out in the margin.[12] As to petitioner

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[12] "The record is clear that the violations of the respondent have been knowing and willful. The maintenance of the prohibited relationships since the commencement of this proceeding and the continuance by Great Lakes of practices prohibited by Order E-6748 on August 28, 1952, demonstrate that the respondents' violations are knowing and willful. The record does indicate some practices have been changed since the institution of this proceeding to bring the respondents' action into closer conformity to the Board's regulations, such as, removing the Skycoach markings from Great Lakes and Currey aircraft, elimination of the word Skycoach in announcing arrivals and departures, modification of the ticket format, etc. These changes, however, do not indicate any lack of

Great Lakes, the finding that the conduct was knowing and willful is predicated partly upon continued disobedience of Board Order E-6748. That order, Docket No. 4161, was issued on August 28, 1952, prior to the commencement of the instant proceeding. The finding and the evidence supporting it are adequate as to the willfulness of Great Lakes.

As to the other petitioners, there is no express finding that knowing and willful conduct occurred before this proceeding was instituted. But it was found that all of the petitioners acted jointly as a single entity in rendering air transportation service.[13] On the basis of that finding all petitioners are chargeable with the knowing and willful conduct by Great Lakes prior to the commencement of this proceeding.[14]

It is therefore our opinion that the Board was not required to comply with section 9(b) or rule 204 before instituting this proceeding, and the failure to comply therewith did not invalidate the order under review.

Petitioners proposed to examine Board officials Andrews and Saltzman in an effort to establish that certain agreements between some of the petitioners had been approved

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willfulness, but merely an attempt to conceal the prohibited activities and relationships.

"There is no indication whatever of any attempt of Great Lakes and the Hermanns to divest themselves of control of Currey Air Transport or of the Skycoach agencies. It is concluded that the violations of the law were both knowing and willful and continue to be so."

[13] The sufficiency of the evidence to support that finding is to be discussed at a later point in this opinion.

[14] In the above discussion we have assumed that section 9(b) of the Administrative Procedure Act is applicable with respect to the kind of operating authority under which Great Lakes and Currey function. In Great Lakes Airlines, Inc. v. CAB, D.C.Cir., ... F.2d ..... decided February 24, 1961, one judge dissenting, it was held that Great Lakes, Currey and other carriers involved in that proceeding held at best temporary licenses, and that section 9(b) was not intended to apply to temporary licenses.

by the Board. It is petitioners' contention that some of the acts which were made the basis of charges in this enforcement proceeding were performed pursuant to those agreements.[15] With regard to these officials the rule 19(g) application was also denied on the ground that their proposed testimony would have been irrelevant.

Section 412(b) of the 1938 act, 52 Stat. 1004 (now 49 U.S.C.A. § 1382(b) (1960 Supp.)), provides that the Board shall approve or disapprove by order certain kinds of agreements between air carriers required to be filed with the Board under section 412(a), now 49 U.S.C.A. § 1382(a) (1960 Supp.). The two agreements here in question were filed with the Board within a year and a half or two years of the commencement of this proceeding. No Board order of approval or disapproval has ever been issued.

Petitioners contend, however, that approval is to be inferred or assumed from the surrounding circumstances. For the purpose of establishing the circumstances relied upon, petitioners sought to show through Andrews and Saltzman the dates when the agreements were filed, whether they were properly filed as section 412 agreements, whether the Board had ever acted on the agreements, and what action the Board had taken thereon.

The dates when these agreements were filed are a matter of official public record, and might also have been established by petitioners' own witnesses. Whether the agreements were properly filed as section 412 agreements is a question of law based on the facts of record concerning the contents of the agreements and the manner of their filing. It was also a matter of public record that the Board had issued no order of disapproval concerning them. Since section 412 contemplated that Board approval would be

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[15] The agreements provide for each carrier to transport passengers presenting a ticket of one of the other carriers under certain circumstances, to act as ticket agent for the others, and to use the others' facilities "to expedite the handling and checking-in of passengers of each. . . ."

manifested by order, any testimony concerning internal processing would be irrelevant on the question of approval.

It follows that the proposed testimony of Andrews and Saltzman concerning the matters petitioners proposed to inquire into would have been irrelevant and unnecessary on the question of section 412 approval. Hence the examiner did not abuse his discretion in denying this part of the section 19(g) application.

Petitioners' argument on this point also raises the substantive question of whether there was such a lapse of time after the filing of the two agreements here in question that despite the lack of a section 412 Board order, approval should be assumed.

We very much doubt that section 412 approval can ever be inferred from lack of Board action, however long the agreements may have been pending before the agency. Assuming, however, that circumstances could exist which would warrant such an inference, we do not believe that they existed here. If these agreements contemplated conduct which was later the object of complaint in this proceeding, it was conduct which was expressly forbidden in the Board's cease and desist order, Order No. E-6748, issued on August 28, 1952. The filing of the enforcement complaint on October 14, 1954, also gave notice that section 412 approval was unlikely after that date.

Nor do we find merit in petitioners' argument that the Board had no right to complain in an enforcement proceeding of acts of the kind which were contemplated by the agreements filed pursuant to section 412 requirements until the Board had acted upon them. Petitioners had already been given notice by the cease and desist order of August 28, 1952, that conduct of the kind here complained of would not receive Board approval. Board disapproval of the section 412 filings was therefore not necessary in order to inform petitioners that such conduct was not permissible.

The four remaining Board employees named by petitioners in their rule 19(g) application of November 12, 1957, were Stout, Flynn, Walker and Sullivan. All four had testi-

fied in this proceeding in the forepart of 1955. Petitioners sought their return to the witness stand so that three lines of inquiry could be pursued: (1) Their further examination in the light of testimony received from other witnesses after these four had testified; (2) the eliciting of testimony to lay a foundation for impeachment of these witnesses by proof of prior contradictory assertions; and (3) to elicit information obtained by these four as a result of investigations conducted since the witnesses testified in 1955 pertaining to petitioners' holding out of regular and frequent air transportation.

The request to recall these witnesses was made two and a half years after they had given their original testimony and as the long-drawn-out proceedings were finally drawing to a close. With regard to the proposed examination in the light of intervening testimony and in order to lay a foundation for impeachment, the rule 19(g) application lacked specificity as to what new facts had been revealed and what testimony of these four witnesses would prove self-contradictory or inconsistent. If petitioners had changed their operating procedures since 1955 so as to eliminate the holding out of regular and frequent air transportation, this could be shown by petitioners' own employees. While petitioners may have believed that the testimony of Board employees would carry more weight with the examiner, the examiner was not required to give this factor controlling consideration in passing on the application.

In view of all the circumstances, we hold that petitioners have failed to show that the refusal to recall these four witnesses for the proposed further examination constituted an abuse of discretion.

The next question to be considered involves the application of the so-called Jencks rule in administrative proceedings.[16]

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[16] As previously noted, the hearings in this proceeding were in recess from April 1955 to August 1957. In the meantime, on June 3, 1957, the Supreme Court announced its decision in Jencks v.

Board employees William Auliffe, John Flynn, Eleanor Walker, William P. Sullivan and Franklin Oelschager testified early in 1955. With a partial exception in the case of Flynn, to be discussed below, none of these witnesses was asked on cross-examination whether a written report or statement of the witness relating to the subject matter of the testimony had been prepared. Likewise, and with the same exception, no request was then made by counsel for petitioners that any report or statement of the witness be produced for examination.

On September 17, 1957, counsel for petitioners orally moved to recall Auliffe, Flynn, Walker, Sullivan and Oelschager to the witness stand. The asserted purpose of this motion was to enable petitioners to lay a foundation for requesting the production, for inspection and as a basis for cross-examination, of any reports or memoranda then in the possession of the Board which had been prepared by those witnesses bearing upon any testimony they had given.

Petitioners thus sought to apply in this administrative proceeding the underlying principle of the Jencks case and statute. That the principle is generally applicable in administrative proceedings has been judicially recognized [17] and is not disputed by the government.

The examiner denied the motion to recall these witnesses. He did not do so on the ground that the Jencks rule is inapplicable in administrative proceedings. Instead he re-

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United States, 353 U.S. 657, that defendants in criminal prosecutions have the right to examine statements and reports prepared by government witnesses. The principle there announced, with some modifications, was later enacted as a statutory rule applicable in criminal prosecutions, on September 2, 1957. 18 U.S.C.A. § 3500.

The validity of this statute as limiting the applicability of the Jencks rule was upheld in Palermo v. United States, 360 U. S. 343; and Rosenberg v. United States, 360 U.S. 367.

[17] NLRB v. Adhesive Prod. Corp., 2 Cir., 258 F. 2d 403, 408; Communist Party of the United States v. Subversive Activities Control Bd., D.C. Cir., 254 F.2d 314, 327-28.

viewed the circumstances under which these and other Board witnesses had testified in 1955 and expressed the view that the necessary foundation should have been laid at that time. Accordingly the denial of the motion to recall these witnesses represents an exercise of discretion. The only question here is whether there was an abuse of that discretion.

While the Jencks rule as such had not been judicially or legislatively articulated in 1955, counsel for petitioners vigorously argued for the rule in substance at the 1955 hearings. The examiner rejected the argument at that time but indicated that the matter might be reconsidered. Apparently with this prospect in view, counsel for petitioners proceeded to lay the necessary foundation for application of the rule with respect to several of the Board witnesses. This foundation consisted simply in developing the fact that a report or written statement of the witness relevant to his testimony had been prepared and was in the possession of the Board.

But as to the five Board witnesses here in question, no attempt was made to lay such a foundation except with regard to records of three telephone conversations concerning which Flynn had testified. The examiner construed this difference in the scope of petitioners' examination of Board witnesses as indicating that in 1955 petitioners were not particularly interested in examining the reports and statements of the five Board employees here in question.

It is difficult to account in any other way for this difference in treatment of Board witnesses by counsel for petitioners. If this premise be accepted, the examiner was entitled under all the circumstances to deny the motion to reopen the matter. The hearings were drawing to a close. Two of the five witnesses involved were no longer Board employees. One of them lived in Chicago where no hearing was to be held. Had the recall of these five witnesses led to the production of prehearing reports and statements, new avenues of inquiry might have been opened which would have re-

quired the calling of rebuttal witnesses. The time lapse between the original testimony and the request for recall was very substantial. The need to finally bring the protracted case to a close undoubtedly, and justifiably, weighed heavily with the examiner.

In our opinion the examiner did not under these circumstances abuse his discretion in declining to recall these five witnesses so that a foundation for application of the Jencks rule might be established.

The examiner ordered production for examination of the pertinent reports and statements as to which a foundation had been laid in the examination of witnesses in 1955. When these were not forthcoming the examiner ordered the testimony of those witnesses stricken. In the case of Flynn the only foundation was in regard to three telephone conversations. When the Board declined to produce the reports as to those conversations, the examiner ordered stricken that part of Flynn's testimony pertaining to the telephone conversations. Petitioners urge that Flynn's entire testimony should have been stricken.

In so far as administrative proceedings are concerned, the Jencks rule is applicable only as a measure of the fundamentals of fair play. It does not seem to us that fair play required that the examiner order the deletion of all of Flynn's testimony. A report limited to three telephone conversations, considered at its worst, would be unlikely to undermine Flynn's testimony on wholly unrelated matters.[18] The foundation having been limited to the telephone conversations, it was not an abuse of discretion for the ex-

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[18] After similarly ruling, the Board in its order here under review stated:

> "In any event, even if we were to disregard Flynn's testimony in its entirety, there is a wealth of evidence in this record showing knowing and willful violations by respondents of such magnitude as to justify our decision herein."

aminer to limit the sanctions of the rule to the testimony concerning those conversations.[19]

It is next contended that three Board regulations which petitioners were found to have violated are invalid. Such invalidity, it is argued, arises from the fact that these regulations were adopted as amendments to existing regulations by the Board without the adjudicatory proceedings provided in the Administrative Procedure Act, 5 U.S.C.A. § 1004(a) and (b). Adjudicatory proceedings were necessary, it is contended, because the amendments in question had the effect of changing the terms of the existing "licenses" held by Great Lakes and Currey as irregular air carriers.[20]

Great Lakes' authority is based on a letter of registration as a large irregular carrier issued by the Board on August 12, 1947, pursuant to the provisions of part 291 of the Board's Economic Regulations. Currey's authority is based on an individual exemption as an irregular transport carrier issued by the Board on March 16, 1951. In both cases authority was granted pursuant to the power vested in the Board under section 416 of the act, 49 U.S.C.A. § 1386. It is therein provided that the Board may under certain circumstances exempt air carriers from the requirement of obtaining certificates of public convenience and necessity.

On May 5, 1947, which was prior to the time that either Great Lakes or Currey received its authority, the Board adopted former section 292.1 of its Economic Regulations governing the regulation of irregular air carriers.[21] Paragraph (b) of section 292.1 as then adopted provided in part:

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[19] We do not undertake to state how we would decide the point if this were a criminal proceeding.

[20] If these evidences of authority held by Great Lakes and Currey are assumed to be "licenses" they were at most temporary and conditional licenses. Great Lakes Airlines, Inc. v. CAB, supra note 14.

[21] 12 Fed. Reg. 3076, 3077 (1947) (as amended and recodified, 14 C.F.R. § 291.1 (1956)).

> "No air carrier shall be deemed to be an irregular air carrier unless the air transportation services offered and performed by it are of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation between, or within, such designated points."

The question to be determined is whether the terms of such authority as thus limited were changed adversely to these petitioners by the subsequent action of the Board in adopting the amendatory regulations to which petitioners call attention. If so, adjudicatory proceedings were necessary, and since none were had the regulations would be invalid at least as to Great Lakes, and a finding of violations could not rest thereon. CAB v. American Air Transp., D.C.Cir., 201 F.2d 189, 193.[22]

Petitioners first challenge a part of an interpretation of former section 292.1, adopted by the Board December 10, 1948.[23] The interpretation sets forth a number of illustrative examples of irregular and regular service. Petitioners call particular attention to the eighth example, subparagraph (8) of the interpretation. This example, quoted in

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[22] Since Currey did not receive its individual exemption until 1951, after all the challenged regulations were adopted, it is not clear to us how Currey is in a position to question the validity of the regulations on the ground asserted. But since the Board order could not be sustained if these regulations are invalid as to Great Lakes, we need not determine whether Currey can raise this point. Even as to Great Lakes a question as to one of the regulations is res judicata as noted in footnote 27, infra. We have, however, preferred to deal with the question on the merits.

[23] CAB Economic Regulation No. 136, 13 Fed. Reg. 7769 (1948), as recodified, interpretation of part 291 of the Economic Regulations, 14 C.F.R. (1956).

the margin,[24] indicates that it was the opinion of the Board that if two or more large irregular air carriers utilized by agreement the services of a single ticket agency, the resulting combined operation would, if frequent and consistent flight service were thereby provided, constitute regular air transportation service by each such carrier.

Secondly, petitioners assert the invalid revision, effective May 20, 1949, of former section 292.1 of the Board's Economic Regulations.[25]

Subparagraph (c)(1)(X) of section 292.1 as originally adopted exempted irregular air carriers from certain provisions of section 408 of the act relating to consolidations, mergers and acquisition of control. Specifically, such carriers were exempted from those provisions of section 408 which made it unlawful, without prior Board approval, (a) for such a carrier or a person controlling it to purchase, lease or contract to operate the properties, or any substantial part thereof, of another irregular air carrier, (b) for any irregular air carrier to consolidate or merge with another irregular air carrier, and (c) for any irregular air carrier or any person controlling it to acquire control of another irregular air carrier. This exemption, however, did not extend to section 408 relationships between irregular air carriers and "any person engaged in any other phase of aeronautics."

Subparagraph (d) of former section 292.1, as amended in May 1949, sets out exemptions available to large ir-

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[24] "(8) Four Large Irregular Air Carriers agree to utilize the services of a single ticket agency, XYZ Ticket Agency, Inc., with respect to service between points A and B, and to furnish to the agent the dates upon which each will operate between A and B. If the flights, considered in combination, of such carriers between A and B reveal a pattern of operations similar to those shown in example (1) through (7) above, the combination of flights constitute regular air transportation and each such carrier is deemed to be conducting regular operations between A and B."

[25] CAB Economic Reg. No. 142, 14 Fed. Reg. 1879, 1881 (1949), as recodified, 14 C.F.R. § 291.15 (1956).

regular carriers (Great Lakes' classification) and contains no exemption as to section 408 of the act. Hence the effect of the May 1949 amendment of former section 292.1 of the Economic Regulations was to make it necessary for carriers such as Great Lakes to thenceforth obtain Board approval prior to entering into control, consolidation and merger arrangements of the kinds referred to above.

The third regulation which according to petitioners was not validly adopted was an amendment, effective December 10, 1949, of part 291 of the Economic Regulations.[26] In its original form part 291 did not require irregular air carriers to supply the Board with data concerning their relations with ticket agencies, brokers and the like. The 1949 amendment of this part added new sections requiring such carriers to file specified information of this kind, established requirements as to the form of tickets sold and prohibited certain agreements between large irregular carriers and ticket agents.

Petitioners argue that with respect to all three of these amendments a question of fact is presented as to whether the amendments changed the terms of Great Lakes' and Currey's operating authority. With this question of fact in mind, at the hearing before the examiner petitioners introduced testimony intended to demonstrate that the practices proscribed in these amendments were generally followed in the irregular air carrier industry prior to the amendments and were essential to its continued economic existence.

This testimony was stricken by the examiner and an offer of proof including the same items was rejected. Petitioners accordingly urge the necessity for a remand with instructions to receive evidence of this kind so that the Board and this court can make a determination as to the validity of the amendments challenged.

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[26] CAB Economic Reg. No. 154, 14 Fed. Reg. 6807 (1949), 14 C.F.R. §§ 291.1(c)(d), 291.23-26 (1956).

If a question of fact were presented as to whether the amendments in question changed the terms of the operating authority of these two carriers, we would agree that evidence relevant to that question should have been received. In that event a remand would be indicated unless it were determined, as urged by the Board, that the order under review is supportable on the basis of other findings not involving the regulations in question.[27]

In our opinion no question of fact was presented because it must be held as a matter of law that the amendments did not change the terms of the operating authority of these carriers. Under their original authority all irregular air carriers were required to offer and perform service of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation between or within designated points. The specific prohibitions of the amendatory regulations in question were made for purposes of clarification of practices the Board previously considered violative of the purpose and intent of existing regulations with regard to control, consolidation, mergers, and ticket agency arrangements. By more stringent regulations bring-

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[27] Such a remand was ordered in CAB v. American Air Transp., D.C. Cir., 201 F.2d 189, 194. In that case a different amendatory regulation was under consideration. It was one which provided for the first time a precise limit on the number of irregular trips which a large irregular carrier is permitted to operate.

The Board has heretofore in a different proceeding upheld the validity of the regulations here questioned. Order No. E-9360, July 1, 1955, unreported. On appeal from that order the Court of Appeals for the District of Columbia found it unnecessary to consider the question, finding the order sustainable on the ground of violations of section 401 of the act. No. American Airlines v. CAB, D.C. Cir., 240 F. 2d 867, 873.

The challenged regulations relating to ticket agencies have heretofore been upheld against a similar attack in a proceeding in which Great Lakes was a plaintiff. Arrow Airways v. CAB, Civil No. 4502-50, D.D.C., December 15, 1950. The Board argues, but petitioners deny, that this court action renders the validity of these regulations res judicata as to Great Lakes.

ing these arrangements under closer Board scrutiny and control, the Board hoped to eliminate widespread violations being practiced indirectly through collective operations.[28]

These matters were within the Board's rule-making powers. See American Trucking Ass'n v. United States, 344 U. S. 298, 319-20. The regulations were of prospective effect with respect to irregular air carriers generally and had been adopted before the petitioners entered into the alleged combinations and agreements in question. The authority under which these carriers were operating did not insulate them (absent adjudicatory proceedings) from an extension and tightening of Board regulations in an effort to police and enforce limitations already in existence.

This being the legal posture of the regulations, the evidence stricken and refused was irrelevant. It would have shown at most that some carriers were exceeding the authority conferred upon them by the Board. It is immaterial for present purposes whether the irregular air carrier in-

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[28] The first regulation complained of, which became effective December 10, 1948, did not purport to be more than an interpretation of the regulation as it existed when Great Lakes received its authority. Hence the real question as to that pronouncement is not as to the manner of its adoption but as to whether it represents a correct construction of the existing regulation. We hope that it does.

The second regulation complained of, which became effective May 20, 1949, did not change the regulations with regard to consolidations, mergers and control as between irregular air carriers and "any person engaged in any other phase of aeronautics." Such arrangements had always been subject to the requirement for prior Board approval. Therefore, in so far as this case is concerned, the 1949 amendment did not affect the rights of Great Lakes and Currey with respect to consolidations, mergers and control as between them and the noncarrier petitioners, all of whom were engaged in "a phase of aeronautics."

The third regulation complained of, made effective December 10, 1949, was adpoted to facilitate Board scrutiny and control of arrangements through which carriers were combining with ticket agencies to conduct operations of a type they were unauthorized to conduct individually.

dustry should be freed from such regulations in order to prosper.

We hold that the regulations under discussion are not invalid as to Great Lakes and Currey because of their adoption without adjudicatory proceedings.

Petitioners next attack certain factual findings on the ground that they are not supported by substantial evidence.

The three findings so challenged in petitioners' opening brief are that (1) petitioner Irving Hermann obtained control of Currey, (2) Great Lakes, Currey and the Skycoach agencies were subject to common control, and (3) Great Lakes and Currey operated frequently and regularly.

It does not appear that petitioners contend that there was no testimonial or documentary evidence to support these findings. Rather, attack is upon the credibility accorded the testimony of witnesses Malcolm G. Robertson and Milton B. Scott, the examiner's acceptance of testimony given by Bernard B. Azorow in 1955 rather than his inconsistent testimony given two years later, the admission of a recordak copy of a check, the examiner's reliance on certain conclusions in the testimony of witness Scott, reliance on facts outside the record, the alleged action of the examiner in shifting the burden of proof to petitioners, and the sufficiency of the evidence to support the examiner's finding that the individual carriers operated frequent and regular service.

Robertson testified concerning a stock transaction involving Currey and Hermann. The purpose in producing this testimony was to show that Hermann owned Currey. Scott testified concerning negotiations with the Hermanns to obtain the Skycoach advertising account and as to the performance of advertising services for Skycoach. This testimony was produced for the purpose of showing that Great Lakes, Currey and all Skycoach agencies were merged or integrated into a single operating unit.

The Board found no basis for disturbing the examiner's assessment of the credibility of these witnesses nor, acting

third-hand in the adjudicatory process, do we. Especially is this so since the testimony of these witnesses concerning particular transactions had considerable corroboration in other testimonial or documentary evidence. But if the particular testimony in question should not have been credited, the fact remains that it was but a small part of the total evidence tending to support the general findings of Hermann's ownership of Currey and of the collective operations of all petitioners.

Nothing in this record warrants us to criticize the examiner for accepting the testimony given by Azorow in 1955 when the events were fresher in his mind than at the time of his inconsistent testimony in 1957.

The examiner did not err in receiving in evidence the recordak copy of a bank check.[29] The examiner's reliance on certain conclusions stated by witness Scott, while perhaps inappropriate, was not prejudicial in view of the totality of the evidence supporting the finding of a combined operation.

The facts outside the record on which the examiner relied related to revenue received by the Skycoach agencies and Currey during 1954 and the number of passengers served and passenger miles operated by Currey during that year. The source on which the examiner relied for this information was the complaint in Great Lakes v. Chan Gurney, *supra* note 2, which contained allegations of this factual data.

All of these petitioners were plaintiffs in that action and are chargeable with the allegations contained in their complaint. Reliance upon those allegations was not error.[30]

The examiner did not shift the burden of proof to petitioners. He expressly recognized that there was no original burden of proof upon them. The examiner did, however,

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[29] United States v. Kushner, 2 Cir., 135 F.2d 668, 674; United States v. Manton, 2 Cir., 107 F.2d 834, 844-45.

[30] See Market St.R.R. v. Comm'n, 324 U.S. 548, 561-62; No. American Airlines v. CAB, 240 F.2d 872 n. 18.

express the view that since in his opinion the office of compliance had made a prima facie case it was "incumbent upon . . . [petitioners] to submit documents peculiarly within their custody to show that the indicated financial relationships do not exist." We find nothing inappropriate in this process of reasoning by the examiner in the course of evaluating the evidence and arriving at an ultimate finding.

In challenging the sufficiency of the evidence to support the finding that the individual carriers operated frequent and regular service, petitioners point to evidence of the average number of flights per month by Great Lakes between New York and Burbank, California. In the fifty-two-month period, September 1, 1952, through December 31, 1956, Great Lakes averaged only 5.2 flights per month between these points. The New York-Burbank route represents the heaviest concentration of flights. Petitioners call attention to the fact that in its Order No. E-9744, issued November 15, 1955, the Board interpreted its frequency restriction to permit eight to twelve flights per month in each direction between two points.

The examiner and Board were not required to base their findings as to frequency and regularity on the time period and flight points utilized in petitioners' computation.[31] The examiner based his ultimate finding as to frequency and regularity of flights on the total data contained in the flight reports filed with the Board and the calendar analysis made of such data. Operations comparable to those found have been held to be clear violations of the restriction against frequent and regular service by irregular air carriers.[32]

Petitioners argue that the record does not disclose the number of flights operated by Great Lakes and Currey

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[31] See Air Transp. Associates, Inc., v. CAB, D.C.Cir., 199 F.2d 181, 185-86; CAB v. Modern Trans., S.D.N.Y., 81 F.Supp. 803, 805, affirmed, 2 Cir., 179 F.2d 622.

[32] See, e.g., Air Transp. Associates, Inc., v. CAB, supra, note 31; CAB v. Modern Air Transp., 179 F.2d at 625.

which were charter flights and hence not "common carrier" flights subject to the limitation as to frequency and regularity. But Great Lakes and Currey were required to specify in their flight reports to the Board any flights claimed to be not includable as common carrier flights. 14 Fed.Reg. 3539 (1949) (as amended, 14 C.F.R. § 242.3(a)(1)(ii) (1956)). The data on which the examiner relied was taken from these reports. Petitioners did not undertake to submit any evidence tending to show error in the reports or in the data drawn therefrom with regard to the character of the flights.

In our opinion all of the challenged findings of the examiner and Board are supported by substantial evidence.

Petitioners vigorously attack the manner in which the Board decided this case, arguing that they were thereby deprived of due process of law. It is alleged that while the Board made the ultimate decision, the opinion containing the findings and conclusions was prepared for its adoption by Board employees, that the Board had insufficient time to decide the case, and that the Board did not consider any portion of the record. Based upon these allegations, petitioners contend that (1) the decision is not truly responsive to the evidence, (2) the requirement of an opinion is vitiated "since the Board did not think this case through," and (3) the asserted inversion of decision and findings "makes a complete mockery of the limited judicial review of agency action." [33]

The examiner's initial decision was issued on January 19, 1959. On February 18, 1959, petitioners filed their exceptions to that decision. Petitioners' brief to the Board was filed on March 27, 1959, and on May 6, 1959, oral argu-

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[33] Quoting language from Westwood, "The Davis Treatise, Meaning to the Practitioner," 43 Minn. L. Rev. 607, 613. Petitioners' argument on this branch of the case is based in large measure on a memorandum prepared by Louis J. Hector on September 10, 1959, at the time of the latter's resignation from the Board, which memorandum is to be found in 69 Yale L.J. 931 (May 1960).

ment was had. The case was decided four and a half months later, on September 28, 1959. The Board acknowledges that its opinion was initially prepared by the Board's staff pursuant to the Board's instructions. It denies that it delegated to staff members any responsibility for the determinations evidenced by that opinion.

The chronology recited above discloses that Board members had ample time to review the record and briefs. No statutory provision or judicially pronounced rule precluded them from relying upon subordinates to sift the record, advise as to the contents thereof, and prepare a draft of findings and an opinion for the Board's consideration. See Morgan v. United States, 298 U.S. 468, 481-82.

It has not been shown that the Board abdicated its deciding function. No circumstance has been alleged which would warrant an inquiry into the internal procedures of the Board in this regard. On September 6, 1960, we denied a motion by petitioners for an order requiring the Board to reopen the administrative proceedings so that evidence bearing upon that point could be received.[34] We adhere to that ruling. See NLRB v. Lane Cotton Mills Co., 5 Cir., 108 F. 2d 568.

Petitioners also contend that the Board's order under review is too broad and vague and prohibits legal conduct, and that the sanctions specified in that order are unduly punitive. In our view these contentions are without merit.

The order is affirmed.

(Endorsed) Opinion Filed May 4, 1961.

Frank H. Schmid, Clerk.

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[34] A request twice denied by the Board in Orders Nos. E-14718 and E-14907, dated December 8, 1959, and February 5, 1960, respectively.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 16672

GREAT LAKES AIRLINES, INC. et al. *Petitioners,*

vs

CIVIL AERONAUTICS BOARD OF THE UNITED STATES, *Respondent.*

Petition to Review an Order of the Civil Aeronautics Board

This cause came on to be heard on the Transcript of Record to Review an Order of the Civil Aeronautics Board

On consideration whereof, It is now ordered and adjudged by this Court that the Order of the Civil Aeronautics Board is affirmed.

(ENDORSED) Judgment
Filed and entered May 4, 1961
Frank H. Schmid, Clerk

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Thursday, June 15, 1961

Before: HAMLEY, HAMLIN, and MERRILL, Circuit Judges

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of the petitioners filed June 2, 1961 and within the time allowed therefor by rule of court, for a rehearing of the above cause be, and hereby is, denied.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16672

GREAT LAKES AIRLINES, INC., ET AL., *Petitioners*,

vs.

CIVIL AERONAUTICS BOARD OF THE UNITED STATES, *Respondent*.

Decree

On petition to review an order of the Civil Aeronautics Board of September 28, 1959.

This cause came on to be heard upon the petition of Great Lakes Airlines, Inc., et al. to review the said Order of the Civil Aeronautics Board. The Court heard argument of respective counsel on February 8, 1961, and has considered the briefs and transcript of record filed in this cause.

On consideration whereof, and pursuant to the opinion this day rendered and filed, it is Ordered, Adjudged and Decreed by this Court that said Order be, and hereby is affirmed, and that the petitioners Great Lakes Airlines, Inc., Currey Air Transport Limited, Irving E. Hermann and Ida Mae Hermann, individually and as co-partners, d/b/a Nevada Aero Trades Company, Air International, Inc., Great Lakes Airlines Agency, Inc., Skycoach Agency of Nevada, Inc., Skycoach Airlines Agency of New York, Inc., Skycoach Airlines Agency of Chicago, Inc., Skycoach Agency of Los Angeles, Inc., Super Skycoach Airlines Agency, Inc., Skycoach Airlines Agency of Detroit, Inc., and Skycoach Agency of San Francisco, Inc., their successors and assigns, abide by and perform the direction of the board in said order contained.

(Endorsed) DECREE
Filed and entered May 4, 1961
Frank H. Schmid, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16672

GREAT LAKES AIRLINES, INC., ET AL., *Petitioners,*

vs.

CIVIL AERONAUTICS BOARD OF THE UNITED STATES,
Respondent.

Order

ON PETITION FOR REHEARING

BEFORE: HAMLEY, HAMLIN AND MERRILL, *Circuit Judges*

The petition for rehearing is denied.

Dated: June 15, 1961

FREDERICK G. HAMLEY
Circuit Judge
OLIVER D. HAMLIN, JR.
Circuit Judge
CHARLES M. MERRILL
Circuit Judge

(Endorsed)
Filed June 15, 1961
Frank H. Schmid,
Clerk.

Opinion of Civil Aeronautics Board

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Docket No. 6908

GREAT LAKES AIRLINES, INC. *et al.*

Decided: September 28, 1959

OPINION

By the Board:

This proceeding was instituted upon complaint filed by the Board's Office of Compliance on October 14, 1954, seeking an order directing respondents to cease and desist from violating certain provisions of the Act.

Respondent carrier Great Lakes is registered with the Board as a large irregular carrier holding letter of registration No. 810, issued August 12, 1947. Currey Air Transport, Ltd., holds an individual exemption as an irregular transport carrier (Order No. E-5202, Docket No. 3951, issued March 16, 1951.)[1] Respondent Nevada Aero Trades Company is a partnership owned solely by the Hermanns,

[1] Since the filing of the complaint herein, the Board issued to Great Lakes and Currey, Supplemental Air Carrier Interim Operating Authorizations Nos. 24 and 21, respectively (issued January 16, 1956, effective January 15, 1956, under authority granted by the Board in Order No. E-9744, dated November 15, 1955 [Docket No. 5132 *et al.*]). By Order No. E-13436, issued January 28, 1959, in the *Large Irregular Air Carrier Investigation,* Docket No. 5132 *et al.,* the interim exemption authority for supplemental air service granted to Great Lakes and Currey by Order No. E-9744, as

engaged in leasing, purchasing, and selling aircraft and aircraft parts to Currey and Great Lakes. Air International, Inc., in which Mrs. Hermann is sole stockholder, provides respondent carriers with their gasoline. Great Lakes Airlines Agency, Inc., a now defunct organization, was originally formed to act as a ticket agency but was used for a time during the period covered by the complaint for banking operations for the Hermanns and Great Lakes in their carrier operations. Respondent Skycoach ticket agencies act as ticket sales representatives for both of the carriers.

The complaint alleges in overall effect that Irving E. Hermann and his wife, Ida Mae Hermann, organized and operating through various partnerships and corporations, have conducted operations as one airline under the name of Skycoach. Specifically, it is alleged that the Hermanns acquired control of respondent air carriers, Great Lakes and Currey, and respondent Skycoach ticket agencies in violation of section 408 of the Act, and have operated in air transportation without authority in violation of section 401(a) of the Act. The complaint further alleges that respondent carriers have entered into agreements with each other and with the other respondents to provide a regular and frequent air transportation service; have individually engaged in frequent and regular operations; have accepted

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amended, was terminated, but the effectiveness of the termination has been stayed pending judicial review. Board Order No. E-13436 stated "That this order shall in no way affect any pending enforcement or compliance proceeding or action, or any enforcement or compliance action taken subsequent to the date of issuance of this order with respect to violations of the Act or the Board's Regulations which may have occurred prior to such date."

passengers from ticket agents with whom they have not entered into written contracts and have failed to file any such agreements with the Board; and have issued and accepted tickets in exchange for air transportation which do not comply with the requirements of the Economic Regulations, all of which constitute violations of section 401(a) of the Act and Part 291 of the Economic Regulations.

It is alleged additionally, that Great Lakes has exceeded the limitations imposed upon its operating authority by a cease and desist order issued by the Board on August 28, 1952 (Order No. E-6748, Docket No. 4161), and thus has violated the order and section 1005(e) of the Act.

Respondents deny that they have engaged in the acts and conduct alleged in the complaint.

After due notice and hearing, Examiner Merritt Ruhlen issued an Initial Decision in which he found that respondents knowingly and willfully had violated the Act and the Board's regulations as charged. The Examiner specifically found (1) that Great Lakes and Currey, each both individually and in combination, violated the regularity and frequency provisions of Part 291 (section 291.1(a)); (2) that all of respondents (with the exception of Skycoach agencies of Newark, Washington, Virginia, Boston, and Milwaukee, as to whom the complaint was dismissed for lack of sufficient evidence) acting jointly, have held out and operated air transportation services in violation of the frequency and regularity provisions of Part 291; (3) that all of the respondents (with the above exceptions) have operated as a single entity, which under the name "Skycoach", engaged in regular air transportation in violation of section 401(a); and (4) that the relationships between respondents violate section 408. The Examiner recommended that the Hermanns, individually and d/b/a Nevada Aero Trades Co., Air International Inc., Great

Lakes Airlines Agency, Inc., and Skycoach respondents[2] be ordered to cease and desist from violating the provisions of section 408 of the Act and from engaging in air transportation either directly or indirectly; that the letter of registration and the supplemental air carrier interim operating authorization No. 24 of Great Lakes and the individual exemption and the supplemental air carrier interim operating authorization No. 21 of Currey should be revoked.

Respondents have filed exceptions to the Initial Decision and a brief in support thereof. The Board has heard oral argument, and the case stands submitted for decision.

After due consideration of the entire record, we agree with and adopt as our own, except as modified herein, the findings and conclusions of the Examiner in his Initial Decision, which is attached hereto as an appendix. The Initial Decision has thoroughly explored the issues and evidence in this case and amply sets forth the reasons for our action herein. Accordingly, we will merely address ourselves in this opinion to certain of respondents' exceptions which warrant comment.

1. From the inception of this proceeding respondents have claimed that the regulations which they were charged with violating are invalid. Thus, respondents challenge Interpretation No. 1 to Part 291 of the Economic Regulations[3] insofar as it deals with combined operations; the May 20, 1949, revision of Part 291 with respect to the withdrawal of the prior exemptions from Section 408 of the

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[2] For purposes of convenience, all references hereinafter to "Skycoach" or "respondents" exclude Skycoach agencies of Newark, Washington, Virginia, Boston, and Milwaukee.

[3] ER-136, paragraph (8), December 10, 1948.

Act;[4] and the ticket agency regulations of December 10, 1949,[5] with respect to the necessity for filing written agreements between irregular carriers and ticket agents, the requirements for the form of tickets issued, and the prohibition against combined operations. However, without regard to violations of these regulations, respondents knowingly and willfully committed other serious and major violations of the Act in that (1) each of the carrier respondents *individually* violated Part 291 of the Economic Regulations and Section 401(a) of the Act by holding out and operating a frequent and regular air service; and (2) all the respondents, acting jointly, constituted a single entity which, under the name "Skycoach," held out to the public and operated a regular air transportation service in violation of Section 401(a) of the Act. Therefore, completely apart from the challenged regulations, it is evident that respondent carriers individually and as members of the illegal "Skycoach Combine" engaged in knowing and willful violations of such magnitude as to justify the sanctions we are imposing.

During the hearing, respondents offered to prove that the amended regulations were invalid. Respondents attempted to make an evidentiary showing that the practices outlawed by these regulations had previously been common industry behavior, that the regulations altered respondents' licenses without the requisite adjudicatory proceeding, and that substantial investments on the part of respondents had been made in reliance on the former regulations.[6] The

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[4] ER-142, Section 291.15.

[5] ER-154.

[6] The evidence of record shows that the combined operations were undertaken after the amendments were promulgated. The Hermanns did not acquire Currey until the middle of 1951, and the record indicates, further, that Currey engaged in no operations between October 1949 and May 1952. And although Great Lakes may, as it claims, have invested substantial sums in joint operations with others prior to these regulations, it appears that the cease and desist order outstanding against Great Lakes was predicated upon these very operations.

Examiner, relying on the Board's determination of the validity of these same regulations in the *Twentieth Century Airlines Case*,[7] rejected respondents' offer of proof. Respondents assign error to the Examiner's refusal to admit the proffered testimony.

The regulations questioned herein were identically challenged in the *Twentieth Century Case, supra.* Evidence similar to that proffered by respondents in the instant case was there received.[8] The Examiner therein ruled that the

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[7] In the *Twentieth Century Case, supra,* we revoked the exemption authority of certain irregular air carriers that had banded together to provide regular air transportation in violation of Section 401(a) of the Act. Noncarrier respondents therein were ordered to cease and desist from violating Section 408 of the Act. Docket No. 6000, Order No. E-9360, July 1, 1955.

[8] Respondents herein offered to prove through a series of witnesses (20 in Los Angeles and other California cities, 18 in New York, 15 in Miami, three in Washington, D. C., and an unknown number in Chicago) that it was common and standard practice in the industry, prior to the amendments in issue, for irregular carriers to engage in pooling arrangements with other carriers, use common ticket agencies and exchange tickets. Respondents also announced their "intention to call for relevant documents of the Civil Aeronautics Board and, also employees, officers, and officials of the Board, some of whom are still with the Board and some of whom have left, to show the intention of the Board in adopting these particular regulations, that they were made with knowledge of the fact that the regulations would change, would limit and condition and reduce existing licenses, that these practices were then legal and were carried on and then at the time these amendments were made illegal (sic)."

Compare this offer of proof with the evidence received in the *Twentieth Century Case, supra,* wherein the Examiner summarized the evidence received as follows:

> "In support of their contentions that the Regulations are invalid, respondents called a number of witnesses who were or had been associated with non-scheduled air transportation activities. These witnesses testified for the most part as to the prevailing practices of the non-scheduled carriers prior to the adoption of the December 10, 1949, revision of the regula-

amendments were merely interpretative and declaratory of existing law and did not diminish respondents' operating authority. The Board sustained this ruling.[9] In these circumstances, the Board has already passed upon the validity of the regulations, and we see no reason to relitigate the same issues anew, where, as here, the evidentiary attack is essentially the same as that previously made and rejected by the Board.[10]

As stated in the *Twentieth Century Case, supra,* we are of the opinion that Interpretation No. 1 "did not cause any

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tions. In general, these witnesses asserted that transportation was sold to members of the public mostly through independent ticket agents who represented all the irregular or non-scheduled carriers operating out of the city of the sale representative's location. Many of the carriers operated between the same points and the agent was thereby able to offer a substantially daily service. These witnesses stated that it was general industry practice for agents to issue exchange orders and for all irregular carriers to accept these orders, either directly in return for transportation or in exchange for one of their own tickets issued at flight time. Although some agents used the ticket stock of a particular irregular carrier, these tickets were comparable to exchange orders since they were accepted as tickets by most any other irregular carrier in exchange at flight time for the latter's ticket. Respondents concede that the scheduling of flights by irregular carriers in such a way as to provide a substanially daily service came about as a result of arrangements between the carriers, either directly or through their agents, and that there also existed a substantial amount of cooperation between the carriers which was designed to assure satisfactory load factors and profitable operations. These same witnesses testified in general that it was their opinion it would not be economically feasible to operate within the revised regulations of December 10, 1949."

[9] The Court of Appeals upheld the revocation order on the basis of the 401(a) violations and did not review the Board's findings with respect to the regulations. *North American Airlines* v. *Civil Aeronautics Board,* 240 F. 2d 867, *cert. denied* 353 U.S. 941.

[10] *Twentieth Century Case, supra,* Order No. E-9360.

diminution or modification whatsoever in the degree of regularity or operations, theretofore permitted under the exemption, but merely served to illustrate the plain limitations of the authority granted to irregular carriers operating pursuant to the exemption" and that the prohibition of "combined operations and the use of a common ticket agent for such purposes, imposed no new requirement, for it simply pointed out that a group of carriers could not legally do what was prohibited if done by each or any of them • • •."[11] The Board stated further, that "irregular carriers were never intended to, and never have had the right to hold out or operate regular services, whether alone or in concert with others," and, therefore, "far from amending or curtailing the carriers operating authority, these pronouncements against combined operations were merely a clarification or interpretation of existing law."[12] Accordingly, we must reject respondents' attack upon Interpretation No. 1.

Respondents argue that the May 20, 1949, amendment to Part 291, subjecting irregular carriers to the requirements of Section 408, deprived them of established rights. They assert that prior to the amendment, they enjoyed exemption from Section 408, and that the amendment improperly withdrew the exemption. However, we note that even though irregular carriers were, prior to the amendment, exempt to a limited extent[13] from Section 408, this exemp-

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[11] *Twentieth Century Case, supra,* Order No. E-9360, p. 5.

[12] *Ibid.* and see *Air Transport Associates* v. *Civil Aeronautics Board,* 199 F. 2d 181 (C.A.D.C. 1952), *cert. denied* 344 U.S. 922, *rehearing denied* 345 U.S. 914, wherein the Court stated that the regulation was no more than what it purported to be, i.e., an interpretation. See also, *Civil Aeronautics Board* v. *Modern Air Transport,* 179 F. 2d 622 (2d Cir. 1950).

[13] "• • • irregular air carriers shall be exempt from section 408 in so far as said section would make it unlawful, without prior approval by the Board, (a) for any irregular air carrier or any per-

tion did not extend to Section 408 relationships between irregular carriers and "any person engaged in any other phase of aeronautics."[14] In view of the fact that all of the

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son controlling any such carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of another irregular air carrier, (b) for any irregular air carrier to consolidate or merge with another irregular air carrier, and (c) for any irregular air carrier or any person controlling any such air carrier to acquire control of another irregular air carrier: *Provided further,* That any irregular air carrier which consolidates or merges with another irregular air carrier and any irregular air carrier or any person controlling any such carrier that acquires control of, or purchases, leases, or contracts to operate the properties, or any substantial part thereof, of another irregular air carrier pursuant to the exemption granted in this section, shall submit to the Board, not more than 30 days following the consummation of the transaction, a report indicating in reasonable detail the nature and result of the transaction." Economic Regulations, 14 C.F.R. § 292.1 (1949 Edition).

[14] "Sec. 408. (a) It shall be unlawful unless approved by order of the *Board* as provided in this section—

"(1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;

"(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier;

"(3) For any air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier;

• • • • • • •

"(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any

noncarrier respondents herein were engaged in a "phase of aeronautics" prior to the promulgation of Section 291.15, they already were subject to the strictures of Section 408.[15]

With respect to the ticketing and ticket agency regulations, the Board found these provisions to be "rule making in nature; of general applicability to all irregular carriers; prospective in effect; and clearly valid as an exercise of the Board's powers under sections 416 and 205 of the

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other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;

"(6) For any air carrier or person controlling an air carrier to acquire control, in any manner whatsoever, of any person engaged in any phase of aeronautics otherwise than as an air carrier; or

"(7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection."

[15] The Hermanns, as sole owners of Nevada Aero Trades Co., were persons engaged in a phase of aeronauties and in this regard were not affected by the May 20, 1949, regulation. With respect to the finding that the Hermanns acquired Currey in violation of Section 408(a)(5), it is noteworthy that this occurred in June 1951, fully two years after the Board had withdrawn the exemptions from Section 408.

Nor were respondent carriers adversely affected by the new regulation inasmuch as they were not "irregular air carriers" within the definition of Section 292.1 and therefore not entitled to the exemption. "No air carrier shall be deemed to be an irregular air carrier unless the air transportation services offered and performed by it are of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation between, or within, such designated points." Economic Regulatoins, § 292.1.

Act."[16] The validity of these regulations was put in issue

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[16] *Twentieth Century Case, supra,* p. 5:

"291.23 *Large irregular carriers; limitations and scope of exemption.* The exemption accorded large irregular carriers by this part shall not extend to the air transportation of persons hereinafter prohibited in this section.

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"(b) Large irregular carriers shall not carry in interstate or overseas air transpotration persons who do not fall into one of the following categories:

"(1) Persons to whom tickets of the carrier in the form prescribed by § 291.24 have been sold and issued at the time of sale by the carrier or one of its regular employees; or,

"(2) Persons who have been furnished by a ticket agent with whom the carrier has entered into a written agreement for the furnishing of passengers, and to whom tickets of the carrier in the form prescribed by § 291.24 have been sold and issued by such ticket agent at the time of sale; or,

"(3) Persons obtained from another air carrier pursuant to written agreement; or,

"(4) Persons to whom the carrier is authorized to grant free or reduced rate transportation pursuant to the provisions of section 403 of the act and Part 223 of this chapter, and to whom passes in the form prescribed by § 291.24 have been issued: *Provided,* That no pass need be issued for free or reduced rate transportation of persons pursuant to § 223.2 of this chapter.

"Section 291.24 *Form of tickets to be used.* Each ticket issued by the carrier, or by its authorized ticket agent, shall have printed thereon the name and address of the carrier, and shall provide appropriate spaces for, and shall have entered thereon, at the time of sale, the name and permanent address of the passenger, the date of sale, the date of flight, origin and destination points, and the fare actually paid by the passenger. Such tickets shall also be signed at the time of sale by a duly authorized officer or employee of the carrier or agent. On or after the date of flight, tickets shall be validated by the carrier in some appropriate manner on the face thereof to indicate that either the transportation service covered thereby has been rendered or appropriate refund has been made where no

in *Arrow Airways v. Civil Aeronautics Board*,[17] wherein the District Court dismissed petitioner's complaint for an injunction to restrain their enforcement and sustained the

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service or only a part of the air transportation service has been rendered. In those cases where the carrier is by law entitled to transport any person at a free or reduced rate a pass shall be issued to such person, with the exception of those persons described in § 223.3 of this chapter, prior to departure of flight and taken up by the carrier at the destination point. Each such pass shall have printed thereon the name and address of the carrier, and shall contain on its face the name and address of the passenger, the date of the flight, origin and destination points, and shall indicate the status of the passenger entitling him to free or reduced rate transportation.

Section 291.26 *Large irregular carriers; conditions on operating authority—agreements with ticket agents.* As express conditions on the operating authority granted by this part and the letters of registration issued hereunder.

(a) Each agreement between a large irregular carrier and any ticket agent shall be reduced to writing and signed by all the parties thereto, if it relates to any of the following subjects:

(1) The furnishing of persons or groups of persons for transportation,

(2) The arranging for flights for the accommodation of passengers or groups of passengers,

(3) The solicitation or generation of passenger traffic to be transported by a large irregular carrier, or

(4) The charter or lease of aircraft.

(b) No large irregular carrier shall make or maintain any agreement, or participate in any arrangement, with or involving any ticket agent or air carrier with respect to the conduct or holding out of air transportation services by such carrier individually or by such carrier in combination, conjunction, or collaboration with another air carrier or carriers, where the collective air transportation service so agreed upon or arranged would, if conducted by a single carrier, take it out of the classification of an irregular air carrier as set forth in this part.

[17] Civil Action No. 4502-50 (D.C.D.C. 1950, unreported).

validity of the regulations.[18] This, of course constitutes a judicial determination of validity,[19] and as to Great Lakes, a party to the proceeding, constitutes *res judicata*, thereby foreclosing the issue. And to the extent that Great Lakes is found guilty of violating the provisions of the consent cease and desist order by engaging in activities proscribed by the challenged regulations, the regulations to that extent are clearly not open to challenge by Great Lakes.[20]

On the basic question whether respondent's rights were improperly diminished by the amended regulations here under attack, we adhere to the views expressed by the

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[18] The regulations were attacked upon the grounds, among others, that they "specifically limit the license of the large irregular carriers * * * and the absence of any hearing violates the due process clause of the Constitution and the adjudication requirements of the Administrative Procedure Act." The Board moved to dismiss the complaint for failure to state a cause of action. In support thereof the Board took the position that the only possible basis for finding a limitation on existing licenses was the view that irregular carriers had previously been free to enter into arrangments among themselves and with ticket agents whereby regular services might be provided through combined operations. The Board argued that this had clearly not been permissible under prior regulations and that the regulation was merely declaratory of existing law and further, that even if it were viewed as a new requirement the regulation was a "rule", properly adopted in rulemaking proceedings regardless of its impact upon persons affected by it.

[19] Contrary to respondents' contention, the Court did not base its decision on the view that "the question whether the 'license' authority of respondent air carriers can better be determined following the completion of the factual record" nor did the Board so view the Court's decision in Order No. E-7528.

[20] In *American Air Transport* v. *Civil Aeronautics Board, supra,* the petitioner was found guilty of violating a cease and desist order which ordered compliance with Part 291. That order had never been appealed. The Court held that petitioners' challenge to the validity of Part 291 was *res judicata.* There would appear to be no difference in principle between an unappealed cease and desist order and one entered by consent.

Board in the *Twentieth Century Case, supra.* The Board there stated:

> "Even if the Board's 1949 prohibition against combined operations constituted a new requirement and was not merely interpretative of existing law, it does not follow that the new requirement effected a change in respondent carriers' 'license,' and that an adjudicatory hearing was required. We do not agree with respondents' claim that the 1949 prohibition against combined operations (as well as the new requirements as to ticketing) effected any change in the respondent carriers' 'licenses.' It is true that the prohibition against combined operations (assuming *arguendo* it was new) placed new restrictions on the way irregular carriers could do business—but that does not mean that the 'licenses' as such were changed. The fundamental operating authority of each irregular carrier—as to points to be served, and as to frequency of permissible operations—remain the same. Thus, while the prohibition touched upon permissible practices of irregular carriers, it did not go to the basic operating authority which was embraced by the license. And this is true, even though the new requirements might have had a substantial financial impact upon the business of respondent carriers. The scope of the carriers' licenses is determined by their basic operating authority regarding points authorized to be served and frequency of permissible service, and not by the extent to which certain practices in connection therewith may be profitable or not." * * * [21]

In view of all the foregoing, we must reject respondents' defenses based upon alleged invalidity of the amendments to Part 291 of the Economic Regulations.

2. Respondents claim they have been denied due process by reason of Rule 19(g) and the Examiner's application of

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[21] *Twentieth Century Case, supra,* p. 6.

this rule; that Rule 19(g) was improperly adopted and is therefore invalid; that respondents were denied equal treatment in the right to present competent and material evidence and were forced to reveal their case in advance; and that Rule 19(g) must be applied to the Office of Compliance.[22]

The controversy over Rule 19(g) in this proceeding arose from the following circumstances: On November 12, 1957, respondents presented subpoenas *ad testificandum* to the Examiner directed to Board employees Andrews, Saltsman, Sullivan, Walker, Burstein, Anton, Stout, and Flynn.[23] The Examiner, relying on Rule 19(g) refused to issue these subpoenas, whereupon, on the same date, respondents filed an application for the attendance of these Board employees as witnesses under Rule 19(g). This application and respondents' request for reconsideration were denied by the Examiner. Thereafter, respondents have contended that by refusing to grant this motion, the Examiner excluded competent and material evidence. An examination of the nature of the evidence to be adduced by the calling of the witnesses requested by respondents, leads us to reject this contention.

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[22] Section 302.19(g) of the Rules of Practice in Economic Proceedings, provides:

> "The provisions of this section are not applicable to the attendance of Board members, officers or employees or the production of documentary evidence in the custody thereof at a hearing. Applications therefor shall be addressed to the Examiner in writing and shall set forth the need of the moving party for such evidence and its relevancy to the issues of the proceeding. Such applications shall be processed as motions in accordance with Rule 18, except that the grant thereof by an Examiner, in whole or in part, shall be immediately reviewed by the Board upon its own initiative and shall be subject to final Board action."

[23] Andrews, Sullivan, Walker, Stout, and Flynn had previously testified as witnesses for Compliance.

Respondents desired to call James Anton and Robert Burstein, Chief and Assistant Chief, respectively, of the Office of Compliance, to "establish whether or not, or to what extent, the Office of Compliance, has satisfied the requirements of Rule 204[24] and Section 9(b) of the Administrative Procedure Act." We have consistently held that the provisions of Rule 204 do not apply to enforcement proceedings instituted by complaints filed by the Office of Compliance, but rather only to those cases where complaints are filed by third persons.[25] It is equally clear, both from

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[24] At the time of the institution of the proceeding, Section 302.204 of the Rules of Practice in Economic Proceedings provided:

> "Prior to the institution of an enforcement proceeding pursuant to § 302.205, the person complained against in a complaint submitted pursuant to § 302.201 shall be afforded an opportunity for the submission of facts, offer of settlement or proposal of adjustment, unless time, the nature of the grounds of the complaint, or the public interest will not permit. • • •"

Rule 204 was amended by the Board on January 1, 1958, Regulation No. PR-30 providing in pertinent part:

> "(c) A person complained against in a third-party complaint may offer to satisfy the complaint through submission of facts, offer of settlement or proposal of adjustment. Such offer shall be in writing and shall be served, within fifteen (15) days after service of the complaint, upon the same persons and in the same manner as an answer. The submittal of an offer to satisfy the complaint shall not excuse the filing of an answer."

[25] *Hacienda Hotels-Motels, Rooms and Flight Reservations, Inc., Enforcement Proceeding,* Order No. E-12192, February 20, 1958, and cases cited therein. See also *National Airlines, Inc., Enforcement Proceeding,* Order No. E-11800, September 19, 1957; *Intra-Mar Shipping Corp., Enforcement Proceeding,* Docket No. 7626, Order No. E-10145, March 30, 1956; *Peninsular Air Transport & Aero Finance Corp.,* Docket No. 6124, Order No. E-7628, August 12, 1953; *Trans-Continental Airlines Agency Corp.,* Docket No. 8013, Order No. E-10552, August 22, 1956; *California Air Charter, Inc., and D. W. Mercer,* Docket No. 8619, Order No. E-11674, August 9, 1957; *American Shippers,* Docket No. 8748, Order No. E-11685, August 13, 1957.

its express terms and numerous Board and court decisions, that Section 9(b) is not applicable where the violations are knowing and wilful.[26]

Respondents also requested that Alphonse Andrews and James A. Saltsman, respectively Assistant Chief, Carrier Relations Division, and Chief, Agreements Section, Carrier Relations Division, be called for the purpose of testifying "• • • concerning the treatment accorded by the Board's staff and the status under applicable Board regulations and procedures of certain agreements filed herein by • • • Great Lakes and Currey." We find no error in the Examiner's rejection of this type of evidence. The Board's orders are the best and only evidence of whether agreements have been approved or disapproved. Accordingly, the testimony of Andrews and Saltsman for the purposes cited by respondents would have been completely irrelevant and immaterial.[27]

Respondents stated in their application that they desired the attendance of witnesses Stout, Flynn, Walker,

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[26] See e.g., *Standard Airlines, Inc., Noncertificated Operations*, 10 C.A.B. 486 (1949); *Viking Airlines, Noncertificated Operations*, 11 C.A.B. 401 (1950); *Trans American Airways, Inc.*, Docket No. 4161, Order No. E-3996 (1950); *In Re Aero Finance Corporation*, Docket No. 5779, Order No. E-7033 (1952); *American Air Transport and Flight School, Inc.*, 14 C.A.B. 601, 606, *aff'd* 199 F.2d 181 (CADC 1952); *New England Air Express, Inc.* v. *Civil Aeronautics Board*, 194 F.2d 894 (CADC 1952); *American Shippers*, Docket No. 8748, Order No. E-11685, August 13, 1957.

[27] Further, it is apparent that respondents intended to question Andrews and Saltsman with respect to internal Board procedures and decisional processes. As the Board stated in the matter of *Twentieth Century Airlines, Inc.*, Docket No. 6000, Order No. E-8517, dated July 15, 1954, in response to a similar request: "• • • we can conclude only that information relating to the internal decisional process • • • is irrelevant and further • • • privileged." The U.S. Court of Appeals affirmed this action in *North American Airlines, Inc.*, v. *C.A.B.*, 240 F.2d 867, 874 (1956) *cert. den.* 353 U.S. 941, stating that "• • • the Board's denial of access to such material reflects no error."

and Sullivan for further testimony in this proceeding. Respondents claimed that the additional testimony would throw further light on new facts brought out by witnesses who had testified subsequent to the testimony of these four Board employees; would enable respondents to lay a foundation for impeachment of these Board witnesses by proof of "prior contradictory assertions"; and would show that respondents had discontinued holding out regular and frequent air transportation.

The first basis for the requested recall of these witnesses was founded on the fact that "various witnesses" testified after Stout, Flynn, Walker, and Sullivan had testified in early 1955, "concerning many matters relating to the testimony of these four witnesses." Respondents claimed that this entitled them to reexamine the foursome to clarify these "new facts" that had arisen. Based also on the intervening testimony of "other witnesses," certain contradictory assertions were purported to exist, thereby requiring recall of the four Board employees for purposes of impeachment.

As to the alleged new facts, nowhere in their pleadings did respondents state with any specificity what these alleged new facts were. And with respect to the claimed inconsistencies, respondents did not show a record of prior *self-contradictory assertions.* Nor did they show that any two statements of any one of the above witnesses were inconsistent. The determination of whether a witness shall be recalled for impeachment rests within the realm of the Examiner's sound discretion. The showing made by respondents is insufficient to convince us that the Examiner abused his discretion by refusing to recall these Board witnesses. Indeed, without the existence of Rule 19(g) it was reasonable to refuse recall of these witnesses.

The second basis for requesting the recall of these four witnesses rested on respondents' assertion that these employees had conducted additional investigations into the activities of respondents, particularly with respect to the

holding out of regular and frequent air transportation by respondents. It was claimed that the testimony of these witnesses was needed to show, on behalf of respondents, that respondents had discontinued holding out regular and frequent services as charged in the complaint.

We fail to see any abuse of discretion by the Examiner in not permitting recall of the witnesses for this purpose. If, on the issue of holding out, respondents were desirous of showing any change in practice from their previous conduct, they had direct access to their own employees to produce evidence on that point. The most that the requested witnesses could conceivably have shown would have been negative in character, and therefore not particularly probative. In all the circumstances, and particularly since the witnesses were being sought for recall, we believe the Examiner's action was proper.[28]

In view of these considerations it is apparent that respondents were not by virtue of Rule 19(g) deprived of a fair opportunity to adduce relevant and material evidence bearing on the issues in the case. If we are correct in this regard, and we are satisfied that we are, little attention need be paid to respondents' contentions that Rule 19(g) was not validly adopted; that Rule 19(g) should have been applied to the Compliance Attorney; and that application of 19(g) to respondents and not to the Compliance Attorney is violative of the Administrative Procedure Act. All of these legal contentions, even if established, would be at best harmless error, since we have shown that in no case did application of Rule 19(g) in fact deprive respondents of evidence to which they were reasonably entitled. But, in any event, we are convinced that respondents' legal contentions as to Rule 19(g) are unsound.

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[28] Even if we are in error in this regard, there would be no sound basis for reopening of the record, since aside from the findings as to "holding out" violations, the remaining violations are so serious as to warrant the sanction imposed herein.

At the time Rule 19(g) was adopted,[29] the Board noted that the rule was procedural rather than substantive in nature and that therefore, notice and public procedure thereon were unnecessary.[30] While respondents now contest this conclusion, they have not presented any matter to demonstrate error in the Board's conclusion. We are satisfied that Rule 19(g) was validly adopted in accord with the provisions of the Administrative Procedure Act.

We also reject respondents' contention that Rule 19(g) should have been applied to the Compliance Attorney. The Compliance Attorney, for practical purposes, has consistently been exempt from such requirements. In promulgating the 1958 amendment to Rule 19(g) (in which the Board added a clause specifically excluding Compliance Attorneys from the procedure set forth in this rule) the Board noted: "The attached rule makes it clear that such motion procedure is not applicable to requests made by the Compliance Attorney. Unlike other parties to an enforcement proceeding, the Compliance Attorney acts on behalf of the Board in deriving facts sufficient to establish a violation and already has the necessary authority to perform this function."[31] This was not an announcement of new regulatory procedure. Rather, it was a restatement of consistent administrative application. However, for the purpose of expediting hearings and in consideration of the fact that substantial procedural delays had been experi-

[29] Reg. No. PR-22, 18 Fed. Reg. 7627, December 1, 1953, as amended by Reg. No. PR-30, adopted December 16, 1957, effective January 1, 1958.

[30] Section 4(a) of the Administrative Procedure Act (5 U.S.C. 1003(a)), provides, *inter alia*, for general notice of proposed rule making, except that "this subsection shall not apply to interpretive rules, general statements of policy, rules of agency organization, procedure, or practice. • • •"

[31] Reg. No. PR-30, adopted December 16, 1957, effective January 1, 1958.

enced in connection with the objection to the use of Board employees by Compliance Attorneys without complying with Rule 19(g), the Board put into specific words that which had always been implicit in the rule.

To the extent that Rule 19(g) results in inequality of treatment between Compliance Attorney and respondents, it is not violative of Section 6(c) of the Administrative Procedure Act. Respondents point out that Rule 19(g) was adopted two days after the Board declined to issue subpoenas requested by Currey directed to four employees of the Board.[32] Respondents neglected to point out, incidentally, that this request was made in an entirely separate proceeding, the *Large Irregular Air Carrier Investigation*, Docket No. 5132 *et al.* In issuing its order denying respondents request therein, the Board noted that under Section 902(f) of the Act and Administrative Memorandum No. 40, dated August 9, 1950, Board employees could not divulge information obtained in the performance of their duties, even in response to subpoena, without prior Board authorization. To accommodate parties who desired access to such information, the Board provided the motion procedure set forth in Rule 19(g). This procedure was not intended to deprive parties of the opportunity to request, in appropriate situations, the testimony of Board personnel or the production of Board documents. Rather, the rule provided a procedure facilitating access to such information. The Board indicated that evidence requested under this motion procedure will be made available "(a) if found relevant and of reasonable scope, (b) if there is an adequate showing by the moving party of a need for the evidence requested, and (c) if no other substantial considerations, such

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[32] *Large Irregular Air Carrier Investigation*, Docket No. 5132 *et al.*, Order No. E-7909, November 23, 1953, in which the Board prior to the existence of Rule 19(g) ruled that Board employees could not appear in response to subpoena by respondents without prior Board approval.

as security or the Board's investigative or decisionable processes, are involved."[33]

The inequality asserted by respondents, to the extent it exists in Rule 19(g), was a necessary and reasonable use of the Board's powers to protect its administrative processes. It was intended for the prevention of improvident access to Board employees and documents, and as such, was necessary to ensure the orderly conduct of the Board's proceedings. We find no infirmity in Rule 19(g) in general, or as it was applied in this proceeding.

3. Nine Board investigators appeared as witnesses for the Office of Compliance at hearings held in Washington during January and February 1955.[34] During the examination of the second investigator (Rickey) it was established that he had prepared reports of his investigation which contained data dealing with the subject matter of his testimony. Respondents requested that these reports be produced for use in cross-examination. In accordance with his understanding of the law as it then existed, the Examiner ruled that the reports need not be produced because the witness had not relied upon them in the course of his testimony. However, counsel for respondents were invited to submit a legal memorandum on the matter to advise the Examiner of any authorities to the contrary.[35] As the hearings proceeded, counsel for respondents inquired of some of the investigators whether they had prepared written reports but as to others no interrogation of the matter was made. Having subsequently established that Hamilton, Stout, and Chambers had also prepared reports, respondents requested that those reports also be produced. After

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[33] Reg. PR-22, November 25, 1953.

[34] The witnesses were Stout, Hamilton, Rickey, Chambers, Flynn, MacAuliffe, Walker, Sullivan, and Oelschlager. (Stout testified in March 1955, in Los Angeles.)

[35] It is again noted this ruling occurred while the second of the nine Board investigators was on the stand.

argument on this issue and the submission of memoranda, the Examiner ruled that respondents were not entitled to any of the reports except those prepared by Stout.[36]

The hearings were in recess from April 19, 1955, until August 27, 1957. On June 3, 1957, the Supreme Court decided the case of *Jencks* v. *United States*, 353 U.S. 657. Respondents, relying on the *Jencks* decision, renewed their motion for production of the investigation reports of Hamilton, Chambers, and Rickey. In the same motion, respondents requested that investigators who had not been interrogated with respect to the existence of prepared reports be recalled for the purpose of laying the foundation necessary for a request for production.

The Examiner ruled that while he considered *Jencks* a very persuasive precedent, and followed the reasoning therein, he did not feel that it was directly controlling in the instant proceeding. He stated, however, that this proceeding was closely akin to a criminal proceeding because it was a government prosecution under public laws. Noting that the criminal laws had been amended by Section 3500 of Title 18 of the United States Code, the Examiner ruled that the investigation reports of Hamilton, Rickey, and Chambers should be turned over to respondents pursuant to that section, or their testimony and exhibits sponsored by them would be stricken from the record. The reports were not produced and the Examiner, accordingly, struck the testimony and exhibits sponsored by the above-mentioned trio.

Respondents, relying upon the *Jencks* case,[37] claim the Examiner erred in not also dismissing the proceeding.

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[36] This ruling was affirmed by the Board (Order No. E-9477, dated August 10, 1955)

[37] Under the *Jencks* decision, the trial court was required to dismiss the prosecution for refusal to comply with an order to produce, whereas 18 U.S.C. 3500 (commonly called the "Jencks Act") gives the trial court the discretion to "strike from the record the testimony of the witness".

Without attempting to delineate the extent, if any, to which the *Jencks* decision may in other respects be applicable to the instant proceeding, we are unable to perceive how principles of "fair play" would require the dismissal respondents urge.

The Examiner also denied respondents' motion to recall the witnesses MacAuliffe, Walker, Sullivan, and Oelschlager.[38] Respondents have urged that the proceedings be reopened for the purpose of interrogating these witnesses in the light of the *Jencks* decision.

We are unable to find that the Examiner abused his discretion by refusing to recall these witnesses. The sole excuse for respondents' failure to elicit the necessary foundation at the time the witnesses were available for cross-examination is that it would have been an "idle act" for them to do so in light of the Examiner's ruling. However, three points belie respondents' position: (1) the first investigator cross-examined by respondents was not questioned with respect to prepared reports—yet he is included in the request for recall;[39] (2) the Examiner specifically evidenced his intention of reconsidering the ruling upon submission of legal memoranda; and (3) respondents, despite the Examiner's tentative ruling, actually laid a foundation for several of the investigators although neglecting to do so for others. It would appear, then, that the true reason for the omission of the proper foundation was not the Examiner's ruling as respondents claim, but rather, as the Examiner suggested, that respondents' counsel "was not enough interested in or considered it imporatnt enough to lay the foundation" at that time.

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[38] Respondents admit that no foundation had been laid regarding the existence of reports of Board investigators MacAuliffe, Walker, Oelschlager, and Sullivan at the time these witnesses testified.

[39] MacAuliffe.

We cannot be led to any conclusion other than that the respondents' belated attempt to recall these witnesses was another of respondents' many endeavors to delay definitive Board action in this proceeding by cluttering up the record with dilatory pleadings and motions (see Appendix 1 to the Examiner's Initial Decision).[40]

Nor do we find error in the Examiner's refusal to strike all of Flynn's testimony. In the course of his testimony, Flynn discussed three telephone conversations of which he had prepared investigation reports. Compliance was directed to produce these reports, and upon their refusal, the Examiner struck from the record that portion of Flynn's testimony relating to these conversations. It is respondents' contention that, at the very least, the Examiner was required to strike Flynn's testimony in its entirety. We disagree. In all the circumstances, we conclude that respondents were fairly treated and that the Examiner's exercise of discretion was sound. In any event, even if we were to disregard Flynn's testimony in its entirety, there is a wealth of evidence in this record showing knowing and willful violations by respondents of such magnitude as to justify our decision herein.

4. Respondents additionally attack the findings of the Examiner on the grounds that they are not supported by the evidence of record; that the testimony upon which he relied conflicts with other testimony in the record; that certain witnesses' statements could not be credited; and that certain exhibits could not be given evidentiary weight because they were not the "best evidence". In general, respondents attack all the witnesses whose narration of the

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[40] We have also taken into consideration the fact that the Office of Compliance had long since closed its case-in-chief; that one of the witnesses requested was no longer a Board employee and had moved to another city; and that the other witnesses were in Washington, D. C., whereas the hearings were then in progress in Los Angeles.

relevant events do not paint a picture of respondents' innocence of the charges filed herein.

We find no difficulty in disposing of these contentions. The Examiner in this instance, who heard and observed the witnesses, resolved the questions of credibility of those who appeared before him and nothing presented to us by respondents persuades us that the Examiner's assessment of the witnesses was erroneous. The Examiner also considered at length and rejected the contention of respondents that certain documentary evidence did not meet the requirements of the "best evidence" rule. We are in accord with the Examiner in all these findings.

We have given due consideration to the exceptions to the Initial Decision filed by the parties and, except as noted above, find that they should not alter our decision herein.

Accordingly, in view of the foregoing and upon consideration of the entire record, we find:

1. All of the respondents except the Newark, Virginia, Washington, Boston, and Milwaukee Skycoach respondents have violated and are continuing to violate the various provisions of the Act and the Economic Regulations thereunder, as alleged in the complaint.

2. The letter of registration and the supplemental air carrier interim operating authorization No. 24 of Great Lakes, should be revoked.

3. The individual exemption and the supplemental air carrier interim operating authorization No. 21 of Currey should be revoked.

4. Irving E. Hermann and Ida Mae Hermann, individually and d/b/a Nevada Aero Trades Co., Air International Inc., Great Lakes Airlines Agency, Inc., Great Lakes Airlines, Inc., Currey Air Transport, Ltd., and Skycoach Agency of Nevada, Inc., Skycoach Airlines Agency of New York, Inc., Skycoach Airlines Agency of Chicago, Inc., Sky-

coach Agency of Los Angeles, Inc., Super Skycoach Airlines Agency, Inc., Skycoach Airlines Agency of Detroit, Inc., and Skycoach Agency of San Francisco, Inc., should be ordered to cease and desist from violating the provisions of Sections 401(a) and 408 of the Act, Parts 242 and 291 of the Board's Economic Regulations, Order No. E-5202, dated March 16, 1951, granting Currey an exemption as an irregular transport carrier, and Order No. E-9744, dated November 15, 1955, as amended, defining the scope of the interim supplemental air carrier authorizations.[41]

5. Irving E. Hermann and Ida Mae Hermann, individually and as copartners d/b/a Nevada Aero Trades Co., Air International Inc., Great Lakes Airlines Agency, Inc., Great Lakes Airlines, Inc., Currey Air Transport, Ltd., and the Skycoach ticket agencies set forth in paragraph 4 immediately prior hereto, should be ordered to cease and desist jointly and severally from engaging in air transportation either directly or indirectly.

6. The complaint against Skycoach Airlines Agency of Newark, Inc., Skycoach Airlines Agency of Virginia, Inc., Skycoach Airlines Agency of Washington, Inc., Skycoach Airlines Agency of Boston, Inc., and Skycoach Airlines Agency of Milwaukee, Inc., should be dismissed.

An appropriate order will be entered.

Durfee, Chairman, Gurney, Vice Chairman, Denny and Minetti, Members of the Board, concurred in the above opinion.

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[41] Under present circumstances, Great Lakes and Currey hold interim operating authorizations as supplemental carriers in regard to interstate, overseas, and intraterritorial air transportation; but as to foreign air transportation, Great Lakes is governed by Parts 242 and 291 of the Economic Regulations, and Currey is governed by Part 242 of the Economic Regulations and Order No. E-5202, dated March 16, 1951.

APPENDIX

DOCKET NO. 6908

THE EXAMINER'S INITIAL DECISION REFERRED TO HEREIN IS NOT ATTACHED TO THIS COPY BECAUSE OF THE WIDE CIRCULATION GIVEN AT THE TIME OF ITS RELEASE. THE INITIAL DECISION IS ATTACHED TO THE ORIGINAL OF THE BOARD'S OPINION AND TO THE OFFICIAL COPIES IN THE BOARD'S FILES AND MAY BE EXAMINED THERE. IT WILL ALSO BE PRINTED AS PART OF THE OFFICIAL "CIVIL AERONAUTICS BOARD REPORTS."

UNITED STATES OF AMERICA CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

Order No. E-14491

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 28th day of September, 1959

In the matter of
GREAT LAKES AIRLINES, INC. *ET AL.*

Docket No. 6908

Enforcement Proceeding

Order

A full public hearing having been held in the above-entitled proceeding and the Board, upon consideration of the record, having issued its opinion, containing its findings, conclusions, and decision, which is attached hereto and made a part hereof;

IT IS ORDERED THAT:

1. Letter of Registration No. 810 issued to Great Lakes Airlines, Inc., and the supplemental air carrier interim operating authorization No. 24 of Great Lakes Airlines, Inc., be and they hereby are revoked, effective 12:01 a.m. EST, November 28, 1959.

2. The individual exemption as an irregular transport carrier of Currey Air Transport, Ltd. (Order No. E-5202, Docket No. 3951, issued on March 16, 1951), and the supplemental air carrier interim operating authorization No. 21

of Currey Air Transport, Ltd., be and they hereby are revoked, effective 12:01 a.m., EST, November 28, 1959.

3. On and after 12:01 a.m., EST, November 28, 1959, Irving E. Hermann and Ida Mae Hermann, individually and as copartners d/b/a Nevada Aero Trades Co., Air International Inc., Great Lakes Airlines Agency, Inc., Great Lakes Airlines, Inc., Currey Air Transport, Ltd., and Skycoach Agency of Nevada, Inc., Skycoach Airlines Agency of New York, Inc., Skycoach Airlines Agency of Chicago, Inc., Skycoach Agency of Los Angeles, Inc., Super Skycoach Airlines Agency, Inc., Skycoach Airlines Agency of Detroit, Inc., and Skycoach Agency of San Francisco, Inc., their successors and assigns, all both collectively and individually, cease and desist from engaging directly or indirectly in air transportation within the meaning of sections 1(10) and 1(21) of the Federal Aviation Act of 1958.

4. On and after 12:01 a.m., EST, November 28, 1959, Irving E. Hermann and Ida Mae Hermann, individually and as copartners d/b/a Nevada Aero Trades Co., Air International Inc., Great Lakes Airlines Agency, Inc., Great Lakes Airlines, Inc., Currey Air Transport, Ltd., and Skycoach Agency of Nevada, Inc., Skycoach Airlines Agency of New York, Inc., Skycoach Airlines Agency of Chicago, Inc., Skycoach Agency of Los Angeles, Inc., Super Skycoach Airlines Agency, Inc., Skycoach Airlines Agency of Detroit, Inc., and Skycoach Agency of San Francisco, Inc., their successors and assigns, all both collectively and individually, cease and desist from engaging in air transportation in violation of the provisions of Section 401(a) of the Act.

5. On and after 12:01 a.m., EST, November 28, 1959, Irving E. Hermann and Ida Mae Hermann, individually and as copartners d/b/a Nevada Aero Trades Co., Air International Inc., Great Lakes Airlines Agency, Inc., Great Lakes Airlines, Inc., Currey Air Transport, Ltd., and Skycoach Agency of Nevada, Inc., Skycoach Airlines Agency of New York, Inc., Skycoach Airlines Agency of Chicago, Inc., Sky-

coach Agency of Los Angeles, Inc., Super Skycoach Airlines Agency, Inc., Skycoach Airlines Agency of Detroit, Inc., and Skycoach Agency of San Francisco, Inc., their successors and assigns, all both collectively and individually, cease and desist from violating the provisions of Section 408 of the Act.

6. Effective immediately, Irving E. Hermann and Ida Mae Hermann, individually and as copartners d/b/a Nevada Aero Trades Co., Air International Inc., Great Lakes Airlines Agency, Inc., Great Lakes Airlines, Inc., Currey Air Transport, Ltd., and Skycoach Agency of Nevada, Inc., Skycoach Airlines Agency of New York, Inc., Skycoach Airlines Agency of Chicago, Inc., Skycoach Agency of Los Angeles, Inc., Super Skycoach Airlines Agency, Inc., Skycoach Airlines Agency of Detroit, Inc., and Skycoach Agency of San Francisco, Inc., their successors and assigns, cease and desist from collectively or individually engaging directly or indirectly in interstate, overseas, or intraterritorial air transportation otherwise than in conformity with Order No. E-9744, dated November 15, 1955, as amended.

7. Effective immediately, Irving E. Hermann and Ida Mae Hermann, individually and as copartners d/b/a Nevada Aero Trades Co., Air International Inc., Great Lakes Airlines Agency, Inc., Great Lakes Airlines, Inc., Currey Air Transport, Ltd., and Skycoach Agency of Nevada, Inc., Skycoach Airlines Agency of New York, Inc., Skycoach Airlines Agency of Chicago, Inc., Skycoach Agency of Los Angeles, Inc., Super Skycoach Airlines Agency, Inc., Skycoach Airlines Agency of Detroit, Inc., and Skycoach Agency of San Francisco, Inc., their successors and assigns, cease and desist from collectively or individually engaging directly or indirectly in foreign air transportation otherwise than in conformity with Parts 242 and 291 of the Economic Regulations applicable to the operations of Great Lakes Airlines, Inc., and Order No. E-5202, dated March 16, 1951, and Part 242 of the Economic Regulations, applicable to the operations of Currey Air Transport, Ltd.

8. Irving E. Hermann and Ida Mae Hermann, individually and as copartners d/b/a Nevada Aero Trades Co., Air International Inc., Great Lakes Airlines Agency, Inc., Great Lakes Airlines, Inc., Currey Air Transport, Ltd., and Skycoach Agency of Nevada, Inc., Skycoach Airlines Agency of New York, Inc., Skycoach Airlines Agency of Chicago, Inc., Skycoach Agency of Los Angeles, Inc., Super Skycoach Airlines Agency, Inc., Skycoach Airlines Agency of Detroit, Inc., and Skycoach Agency of San Francisco, Inc., be notified immediately by telegram of the entry of this order, and thereafter be duly served with a copy of this order.

9. The complaint against Skycoach Airlines Agency of Newark, Inc., Skycoach Airlines Agency of Virginia, Inc., Skycoach Airlines Agency of Washington, Inc., Skycoach Airlines Agency of Boston, Inc., and Skycoach Airlines Agency of Milwaukee, Inc., be and it hereby is dismissed.

By the Civil Aeronautics Board:

(SEAL)

/s/ Mabel McCart
Mabel McCart
Acting Secretary

APPENDIX B

Statutes and Regulations

Federal Aviation Act of 1958 (72 Stat. 737, 49 U.S.C. § 1301 *et seq.*):

DEFINITIONS

SEC. 101. [72 Stat. 737, 49 U.S.C. 1301] As used in this Act, unless the context otherwise requires—

• • •

(3) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided*, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest."

• • •

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

• • •

(13) "Citizen of the United States" means (a) an individual who is a citizen of the United States or of one of its possessions, or (b) a partnership of which each member is such an individual, or (c) a corporation or association created or organized under the laws of the United States or of any State, Territory, or possession of the United States, of which the president and two-thirds or more of the board of directors and other managing officers thereof are such individuals and in which at least 75 percentum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions.

• • •

(21) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof; whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

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CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Certificate Required

SEC. 401. [72 Stat. 754, 49 U.S.C. 1371] (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

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SEC. 408. [72 Stat. 767, 49 U.S.C. 1378] (a) It shall be unlawful unless approved by order of the Board as provided in this section—

(1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;

(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier;

(3) For any air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier;

(4) For any foreign air carrier or persons controlling a foreign air carrier to acquire control, in any manner whatsoever, of any citizen of the United States engaged in any phase of aeronautics;

(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;

(6) For any air carrier or person controlling an air carrier to acquire control, in any manner whatsoever, of any person engaged in any phase of aeronautics otherwise than as an air carrier; or

(7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection.

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CLASSIFICATION AND EXEMPTION OF CARRIERS

Classification

SEC. 416. [72 Stat. 771, 49 U.S.C. 1386] (a) The Board may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this title as the nature of the services performed by such air carriers shall require; and such just and reasonable rules and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the Board finds necessary in the public interest.

Exemptions

(b) (1) The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

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ORDERS, NOTICES, AND SERVICE

SEC. 1005. [72 Stat. 794, 49 U.S.C. 1485] • • •

Compliance with Order Required

(c) It shall be the duty of every person subject to this Act, and its agents and employees, to observe and comply with any order, rule, regulation, or certificate issued by the Administrator or the Board under this Act affecting such person so long as the same shall remain in effect.

• • •

JUDICIAL REVIEW OF ORDERS

ORDERS OF BOARD AND ADMINISTRATOR SUBJECT TO REVIEW

SEC. 1006. [72 Stat. 795, 49 U.S.C. 1486] (a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

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CERTIFICATION OR CERTIORARI

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of title 28, United States Code.

Administrative Procedure Act (60 Stat. 237, 5 U.S.C. § 1001 et seq.):

SEC. 6. [60 Stat. 240; 5 U.S.C. 1005]

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ANCILLARY MATTERS

(c) Subpenas.—Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such

subpena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

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CIVIL AERONAUTICS BOARD

Procedural Regulations

Part 302—Rules of Practice in Economic Proceedings

14 C.F.R. § 302.19 (1961 Supp.)

• • •

§ 302.19 *Subpenas.* (a) An application for a subpena requiring the attendance of a witness or the production of documentary evidence at a hearing may be made without notice by any party to the Examiner designated to preside at the reception of evidence or, in the event that an Examiner has not been assigned to a proceeding or the Examiner is not available, to the Chief Examiner, for action by himself or by a member of the Board.

(b) A subpena for the attendance of a witness shall be issued on oral application at any time.

(c) An application for a subpena for documentary or tangible evidence shall be in duplicate except that if it is made during the course of a hearing, it may be made orally on the record with the consent of the Examiner. All such applications, whether written or oral, shall contain a statement or showing of general relevance and reasonable scope of the evidence sought, and shall be accompanied by two copies of a draft of the subpena sought which shall describe the documentary or tangible evidence to be subpenaed with as much particularity as is feasible.

(d) The Examiner or member of the Board considering any application for a subpena shall issue the subpena

requested if the application complies with this section. No attempt shall be made to determine the admissibility of evidence in passing upon an application for a subpena, and no detailed or burdensome showing shall be required as a condition to the issuance of a subpena. It is the purpose of this section, on the one hand, to make subpenas readily available to parties, and, on the other hand, to prevent the improvident issuance of subpenas to secure evidence which is unrelated to the issues of the proceeding or wholly unreasonable in its scope.

(e) Where it appears at a hearing that the testimony of a witness or documentary evidence is relevant to the issues in a proceeding, the Examiner or Chief Examiner may issue on his own motion a subpena requiring such witness to attend and testify or requiring the production of such documentary evidence.

(f) Subpenas issued under this section shall be served upon the person to whom directed in accordance with Section 302.8(b). Any person upon whom a subpena is served may within seven (7) days after service or at any time prior to the return date thereof, whichever is earlier, file a motion to quash or modify the subpena with the Examiner designated to preside at the reception of evidence or, in the event an Examiner has not been assigned to a proceeding or the Examiner is not available, to the Chief Examiner for action by himself or by a Member of the Board. If the person to whom the motion to modify or quash the subpena has been addressed or directed has not acted upon such a motion by the return date, such date shall be stayed pending his final action thereon. The Board may at any time review, upon its own initiative, the ruling of an Examiner or the Chief Examiner or a member of the Board denying a motion to quash a subpena. In such cases, the Board may at any time order that the return date of a subpena which it has elected to review be stayed pending Board action thereon.

(g) The provisions of this section are not applicable to the attendance of Board Members, officers or employees or the production of documentary evidence in the custody thereof at a hearing. Applications therefor shall be addressed to the Examiner in writing and shall set forth the need of the moving party for such evidence and the relevancy to the issues of the proceeding. Such applications shall be processed as motions in accordance with § 302.18 except that a grant of such motion by an Examiner, in whole or in part, shall be immediately reviewed by the Board on its own initiative and shall be subject to final Board action. No application will be required for the attendance of Board personnel or the production of records in their custody when requested by an Enforcement Attorney. Where a Board employee has testified in an enforcement proceeding that he used documents in his custody, or parts thereof, to refresh his recollection, a ruling by the Examiner for their production shall be final in the absence of an objection by the Enforcement Attorney. In the event of such objection, Board review will be limited to the documents, or portions thereof, to which objection is taken by the Enforcement Attorney.

Regulation No. PR-22

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Procedural Regulations
Amendment No. 8 to Part 302
Adopted: November 25, 1953
Effective: November 25, 1953

Rules of Practice in Economic Proceedings

TESTIMONY BY BOARD PERSONNEL AND PRODUCTION OF BOARD RECORDS

The present section 302.19 of the Procedural Regulations, relating to subpoenas, does not now contain any specific provision restricting the issuance of subpoenas for testimony by Board personnel or the production of Board documents in economic proceedings. However, when the section is considered in the light of the grant of the subpoena power in section 1004 of the Civil Aeronautics Act and the restriction contained in Board Administrative Regulations, it is clear that it was not the purpose or intention of the Board that subpoenas should be issued under the section to obtain testimony of Board personnel or the production of Board records. Under existing Administrative Regulations, Board officers or employees are forbidden to disclose official information, in response to a subpoena from any source, unless specifically authorized to do so.

Although this is the Board's interpretation of the existing regulations, it is deemed desirable as a matter of notice to issue a clarifying amendment to section 302.19 of the procedural rules containing this view of the application of the section.

By this action the Board does not intend to deprive parties of the opportunity to request, in appropriate situa-

tions, the testimony of Board personnel or the production of Board documents. The attached rule provides a procedure for such purpose by way of motion under Rule 18. A denial of such a motion will not be reviewed by the Board unless the Examiner grants an appeal from his ruling under Rule 18 (f). Since Board regulations prohibit officers and employees from disclosing official information without Board authorization, an Examiner's ruling granting a motion for testimony by Board members, officers, or employees or the production of documents in their custody will be reviewed by the Board on its own motion. In making such a review the Board will follow the general policy of making such evidence available (a) if found relevant and of reasonable scope, (b) if there is an adequate showing by the moving party of a need for the evidence requested, and (c) if no other substantial considerations, such as security or the Board's investigative or decisional processes are involved.

Since this amendment is not a substantive rule but one of agency procedure, notice and public procedure hereon are unnecessary, and the amendment may be made effective upon less than 30 days' notice.

In consideration of the foregoing, the Civil Aeronautics Board hereby amends Part 302 of the Procedural Regulations (14 CFR 302) as follows, effective November 25, 1953:

1. By adding to section 302.19 a new paragraph (g) to read as follows:

> (g) The provisions of this section are not applicable to the attendance of Board members, officers or employees or the production of documentary evidence in the custody thereof at a hearing. Applications therefor shall be addressed to the Examiner in writing and shall set forth the need of the moving party for such evidence and its relevancy to the issues of the pro-

ceeding. Such applications shall be processed as motions in accordance with Rule 18, except that the grant thereof by an Examiner, in whole or in part, shall be immediately reviewed by the Board upon its own initiative and shall be subject to final Board action.

Section 205(a), 52 Stat. 984, 49 U.S.C. 425; interpret or apply section 1001, 52 Stat. 1017, 49 U.S.C. 641.

By the Civil Aeronautics Board:

/s/ M. C. Mulligan
M. C. Mulligan
Secretary

(Seal)

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In the Supreme Court of the United States

OCTOBER TERM, 1961

GREAT LAKES AIRLINES, INC., et al.,
PETITIONERS

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 291 F.2d 354. The findings and order of the Civil Aeronautics Board (Pet. App. 32a-62a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1961 (Pet. App. 29a), and a petition for rehearing was denied on June 15, 1961 (Pet. App.

31a). The petition for a writ of certiorari was filed on August 15, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under Rule 19(g) of the Civil Aeronautics Board's Rules of Practice, petitioners were deprived of a fair hearing in the revocation proceeding before the Board where they were refused permission to recall Board employees to testify as to knowledge they had acquired as to alleged changes in petitioners' conduct of their business.

2. Whether, under the *Jencks* rule, petitioners were deprived of a fair hearing in the revocation proceeding before the Civil Aeronautics Board where they were refused permission to recall certain Board employees more than two years after they had testified in order to inquire whether the employees had made any contemporaneous reports concerning matters to which they had testified, and where only the portion of a witness' testimony shown to have been the subject of his unproduced investigative report, not his entire testimony, was stricken from the record.

3. Whether the Board abused its discretion in issuing a cease and desist order precluding, without geographical limitations, the type of violations found to have been committed rather than confining its order to activities in the specific geographical area in which the violations occurred.

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Federal Aviation Act, the Administrative Procedure Act, and the regulations of the Civil Aeronautics Board are set forth in Appendix B to the petition for certiorari (pp. 63a-73a).

STATEMENT

Petitioners are two air carriers, Great Lakes Airlines and Currey Air Transport; the owners of the air carriers, Mr. and Mrs. Hermann; and several service companies and "Skycoach" ticket agencies controlled by the Hermanns. The two air carriers held exemption authority to conduct only infrequent and irregular operations between any two points. The Board found that the two carriers individually had provided and held out to the public a regular and frequent transcontinental service,[1] and, together

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[1] The carriers are of the class known as "Large Irregular" or "Supplemental" carriers, initially authorized to operate irregular and limited services under blanket exemption regulations and orders (see Pet. App. 18a, 19a). In its *Large Irregular Air Carrier Investigation*, 22 C.A.B. 838, the Board ultimately determined that exemption authorization of existing "Supplemental" carriers found to be fit to operate under the new requirements should be supplanted by certificates of public convenience and necessity, but that the exemption authorization of those found to be unfit should be allowed to terminate. The two carriers here involved were in this latter category. The Board's order terminating the prior domestic operating authority of the two carriers was affirmed in *Great Lakes Airlines, Inc.* v. *Civil Aeronautics Board*, 291 F. 2d 354 (C.A. D.C.) certiorari denied, 366 U.S. 965, petition for rehearing pending, No. 918, O.T., 1960. The

with various ticket agencies and service companies under the common control and management of the Hermanns, had held out and conducted regular operations as a single integrated carrier without any authority to act as such an entity.[2] The Board found these violations, standing alone, to have been wilful and of such magnitude as to justify revoking the operating authorizations of the two air carriers and ordering all petitioners to cease and desist from engaging in such activities (Pet. App. 36a). In addition, the Board found that petitioners had further wilfully violated the Federal Aviation Act and its regulations by entering into the various control relationships without Board approval, by disregarding the prohibition against combining the operations of irregular carriers in order to effect a regular service, and by not complying with certain ticket agency requirements (Pet. App. 36a-45a).

Board's refusal to issue new certificates for domestic operation to the two carriers was affirmed on June 8, 1961. *Great Lakes Airlines, Inc.* v. *Civil Aeronautics Board* (No. 16,165, C.A. D.C.). A Board order terminating the foreign and overseas and intra-territorial exemption authorizations of the two carriers is now pending on appeal. *Great Lakes Airlines, Inc.* v. *Civil Aeronautics Board* (No. 16,349, C.A. D.C.).

[2] The petitioners operated "as the 'Skycoach' air travel system" (see *Civil Aeronautics Board* v. *Hermann*, 353 U.S. 322), in the same manner as had "North American Airlines," an earlier combination of carriers, ticket agents, and service companies banded together under common control. The Board's enforcement order in the present case is virtually identical to the one entered against the North American group. See *North American Airlines* v. *Civil Aeronautics Board*, 240 F. 2d 867 (C.A. D.C.), certiorari denied, 353 U.S. 941.

The court of appeals unanimously upheld the Board's findings and order against challenges of a lack of substantial evidence, invalidity in various regulations, a denial of fair hearing, and an unduly broad cease and desist order (Pet. App. 1a-28a). Petitioners here do not challenge the merits of the Board's order, as affirmed by the court of appeals, but limit their petition to two contentions: (1) that they were denied a fair hearing under Rule 19(g) of the Board's Rules of Practice and under the rule established in *Jencks* v. *United States*, 353 U.S. 657, and in 18 U.S.C. 3500; and (2) that the Board's order is unduly broad and punitive.

1. Under Rule 19(g) (Pet. App. 70a), private persons must make application for the testimony of Board personnel and the production of Board records in Board proceedings by motion to the hearing examiner, rather than by application for the issuance of subpoenas as otherwise specified in Rule 19 (Pet. App. 68a-69a). Petitioners desired to recall four Board employees to testify in order to clarify certain facts to which other witnesses had testified, to impeach the Board witnesses, and to have the Board witnesses testify as to their knowledge that petitioners had discontinued their "holding out" of frequent and regular service. Petitioners initially requested the examiner to issue subpoenas directed to the Board employees (Pet. App. 46a). The examiner declined to issue the subpoenas. Petitioners thereupon presented applications for the appearance of the employees under Rule 19(g). The examiner also refused this application. The Board approved this re-

jection (Pet. App. 45a-53a), and the court of appeals affirmed (Pet. App. 4a-14a).

2. A total of nine Board investigators appeared as witnesses on behalf of the Office of Compliance during the hearings held in Washington in January and February of 1955. Counsel for the petitioners questioned some of the investigators, but not all, as to whether they had prepared investigative reports. The counsel demanded those reports which were stated to have been prepared. Except in the case of one witness, however, the examiner refused to require production of the reports.

Subsequently, from April 19, 1955 to August 27, 1957,[3] there was a recess in the evidentiary hearings. In the interim, the decision in *Jencks* v. *United States*, *supra*, was handed down.

After the hearings resumed, petitioners again demanded the reports, which had previously been denied, and also sought to recall the investigators not previously interrogated as to whether they, too, had prepared investigative reports.

The examiner held, and the Board and court agreed, that the principles established in the *Jencks* case and in 18 U.S.C. 3500 were applicable to the administrative proceeding before him. Accordingly, he struck the testimony and exhibits of those Board witnesses who had previously testified that they had filed investigative reports, but who did not produce the reports for the petitioners (Pet. App. 54a). The ex-

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[3] The recess was caused by litigation involving the enforcement of subpoenas, and culminating in the decision in *Civil Aeronautics Board* v. *Hermann*, 353 U.S. 322.

aminer also struck that portion of the testimony of the witness Flynn involving certain telephone conversations which had been shown to be the subject of an investigative report which had not been produced (Pet. App. 56a; R. 775, 1135-1136). Both the Board (Pet. App. 56a) and the court of appeals (Pet. App. 17a-18a) found that the examiner had not abused his discretion in striking only a portion of Flynn's testimony.

In addition, the examiner, after reviewing the circumstances under which the Board witnesses had testified in 1955, denied petitioners' motion to recall the Board investigators on the ground that the necessary foundation to prove the existence of the investigative reports could and should have been laid in 1955. Both the Board (Pet. App. 53a-56a) and the court (Pet. App. 14a-17a) held that the examiner had not abused his discretion in refusing to recall these witnesses.[4]

3. In ordering petitioners to cease and desist from future violations of the Act and Board Regulations

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[4] The Court of Appeals summarized the situation as follows (Pet. App. 16a-17a):

> "The hearings were drawing to a close. Two of the five witnesses involved were no longer Board employees. One of them lived in Chicago where no hearing was to be held. Had the recall of these five witnesses led to the production of prehearing reports and statements, new avenues of inquiry might have been opened which would have required the calling of rebuttal witnesses. The time lapse between the original testimony and the request for recall was very substantial. The need to finally bring the protracted case to a close undoubtedly, and justifiably, weighed heavily with the examiner."

they had been found to have wilfully violated, the Board framed its order generally, without geographical limitation, and did not limit the prohibitions to the domestic services in which the particular violations had been uncovered (Pet. 59a-62a). The lower court found "without merit" the petitioners' contentions that the Board's order "is too broad and vague and prohibits legal conduct, and that the sanctions specified in that order are unduly punitive" (Pet. 28a).

ARGUMENT

The decision below is a limited one, clearly sustainable on its own facts, which presents no significant issues of general applicability relating to the validity of the Board's Rule 19(g), the application of the *Jencks* rule to administrative proceedings, or the permissible scope of cease and desist orders. Further review by this Court is not warranted.

1. Petitioners contend (Pet. 12-18) that the provisions of Rule 19(g) of the Board's Rules of Practice, providing a procedure by which parties to Board proceedings may seek the attendance of Board employees as witnesses (Pet. App. 70a; see *supra*, p. 5), is in direct conflict with the provisions of Section 6(c) of the Administrative Procedure Act governing agency subpoenas (Pet. App. 67a-68a). The court of appeals rejected this contention. It concluded (Pet. App. 7a-8a) that the requirement of Rule 19(g), that the applicant "set forth the need * * * for such evidence and its relevancy to the

issues of the proceeding," is essentially equivalent to the requirement of Section 6(c) of the Administrative Procedure Act, that there be "a statement or showing of general relevance and reasonable scope of the evidence sought."

Moreover, the court pointed out (Pet. App. 8a) that, even if in certain situations Rule 19(g) might be interpreted or applied to go beyond the scope of Section 6(c), "the fact remains that no such improper requirement was imposed in these proceedings. Petitioner's application was denied under Rule 19(g) on the grounds of irrelevance and unreasonable scope, the grounds which section 6(c) specifies may call for denial of an application."

Thus the court affirmed the Board's findings that Rule 19(g) and Section 6(c) were consistent (see Pet. App. 50a-53a); that petitioners had not made a sufficient showing of new facts for recall of the witnesses or of a valid basis for impeachment of the witnesses (Pet. App. 48a-50a); and that the examiner had not abused his discretion in rejecting petitioners' alleged discontinuance of certain improper practices since petitioners had "direct access to their own employees to produce evidence on that point" and since "the most that the requested witnesses could conceivably have shown would have been negative in character, and therefore not particularly probative" (Pet. App. 50a).[5] As the Board pointed out (Pet.

[5] The Board added that "[e]ven if we are in error in this regard, there would be no sound basis for reopening of the record, since aside from the findings as to 'holding out' violations, the remaining violations are so serious as to warrant the sanction imposed herein" (Pet. App. 50a, n. 28).

App. 50a), petitioners "were not by virtue of Rule 19 (g) deprived of a fair opportunity to adduce relevant and material evidence bearing on the issues in the case." Under these circumstances, there is no warrant for further review of the Board's application of Rule 19(g).

2. Furthermore, there is no issue presented here as to the applicability to administrative proceedings of the principles established in *Jencks* v. *United States*, 353 U.S. 657, and in 18 U.S.C. 3500. The Board readily agreed that the *Jencks* principles are applicable and in fact struck from the present record testimony by Board witnesses who had testified in response to petitioners' inquiries that they had prepared investigative reports which were not subsequently produced upon petitioners' demand (see the Statement, *supra*, p. 6). Moreover, the determination by the Board, affirmed by the court of appeals, that there was no abuse of discretion under the circumstances of this case in the examiner's refusal to recall those government witnesses whom petitioners had not previously chosen to interrogate concerning the possible existence of investigative reports (see the Statement, *supra*, p. 7) clearly does not present any issue of general importance which warrants further review.

Nor are petitioners correct in their contention that Flynn's entire testimony should have been stricken (Pet. 19-20; see Pet. App. 56a), rather than only that portion involving the telephone conversations (see the Statement, *supra*, pp. 6-7). The court of appeals held (Pet. App. 17a) that "[i]n so far as ad-

ministrative proceedings are concerned, the Jencks rule is applicable only as a measure of the fundamentals of fair play," and "that fair play [did not require] that the examiner order the deletion of all of Flynn's testimony." The court of appeals' holding was consonant with this Court's holding in *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 29, that the question whether the entire testimony of a witness should be stricken in the event of failure to produce reports directed to only a part of the testimony is a matter resting within the "wide discretion" of the trier of facts.

3. Finally, petitioners charge that the Board's order is unduly broad in that it directs them to cease and desist from certain specified practices in "overseas" and "foreign" air transportation, in addition to the "interstate" air transportation area of their operations in which the various violations were found to have occurred.[6] But the prohibitions of an order need not be confined to the particular geographical area to which the evidence of illegal conduct related. See *United States* v. *United States Gypsum Company*, 340 U.S. 76, 90; *Wilson & Co.* v. *Benson*, 286 F. 2d 891, 896 (C.A. 7); *Maryland Baking Company* v. *Federal Trade Commission*, 243 F. 2d 716, 718 (C.A.

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[6] "Overseas air transportation" is defined by the Federal Aviation Act of 1958 to encompass air service between a United States territory or possession and any state (or the District of Columbia) or other territory and possession (49 U.S.C. 1301 (21) (b)). "Foreign air transportation" is defined to cover transportation between any place in the United States and any place outside of the United States (49 U.S.C. 1301 (21) (c)).

4).[7] The wilful and persistently illegal conduct in which petitioners were found to have engaged did not turn on geographical considerations, and petitioners point to no meaningful distinctions between interstate, overseas, and foreign air transportation which makes a geographically unlimited order unjustified.

[7] *Communications Workers* v. *National Labor Relations Board*, 362 U.S. 479, is inapposite here, for it does not relate to the question of the geographical scope of an order, as do the cited cases. Rather, *Communications Workers* was concerned with the question whether a party enjoined from committing unfair labor practices with respect to one employer may be enjoined, in the absence of any supporting record evidence, from committing unfair labor practices with respect to any other employer.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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v.

CIVIL AERONAUTICS BOARD OF THE UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

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v.

CIVIL AERONAUTICS BOARD OF THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

Petitioners pray that this Court grant rehearing of its order of October 23, 1961, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above-entitled case.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

In the petition for certiorari in the present case, Petitioners urged, among other things, that Rule 19(g) of the Civil Aeronautics Board unlawfully curtailed subpoena rights secured to Petitioners by Section 6(c) of the Administrative Procedure Act (5 U.S.C. § 1005 (c)). Rule 19(g) provides that subpoenas compelling the attendance of C.A.B. personnel will not be issued to private parties who are respondents in adjudicatory proceedings before the Board unless both the "need" and "relevancy" of the evidence sought is established by the movant. Petitioners argued that the requirement of "need" is inconsistent with Section 6(c) of the A.P.A. which contemplates that subpoenas shall be issued simply upon a showing of "general relevance and reasonable scope of the evidence sought."

In conformity with Rule 58(2) of the rules of this Court, this petition for rehearing is confined to substantial grounds available to Petitioners not previously presented. Petitioners respectfully submit that certiorari should issue for the following reasons:

First. C.A.B. Rule 19(g), which expressly exempts the Enforcement Bureau of the Board from its requirements, cannot be reconciled with the proviso in Section 12 of the Administrative Procedure Act that administrative agency regulations "relating to evidence or procedure shall apply equally to agencies and persons." In short, Rule 19(g) is discriminatory on its face and its application in this case deprived Petitioners of a fair hearing.

Second. There is a substantial question whether the Civil Aeronautics Board decided the present case upon

the basis of the record in conformity with the requirements of Sections 7(c) and 8(b) of the Administrative Procedure Act and due process of law.

1. Rule 19(g) Is Discriminatory in Violation of Section 12 of the A.P.A.

C.A.B. Rule 19[1] governs the issuance of compulsory process in adjudicatory proceedings before the Board. The rule provides that a subpoena *ad testificandum* will be issued to any party upon application to the hearing examiner (Subsection (a)). A request for a subpoena *duces tecum* must be supported by a "showing of general relevance and reasonable scope of the evidence sought." (Subsection (c)).

A separate and special rule governs the issuance of subpoenas addressed to Board members or employees. The applicant must establish both "the need . . . for such evidence and the relevancy to the proceedings." The Enforcement Bureau—the prosecuting arm of the Board—is, however, exempt from this requirement. Rule 19(g) explicitly provides that "No application will be required for the attendance of Board personnel or the production of records in their custody when requested by an Enforcement Attorney."

Rule 19(g) is patently discriminatory. If the Enforcement Branch desires to subpoena an employee of a respondent as a witness, it is not required to make any showing whatever; the subpoena is issued upon request. But if the respondent, a private party, seeks to call an employee of the Board, it must satisfy an exacting standard; it must prove both "need" and

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[1] The rule is set out in the Appendix to the Petition for Certiorari, p. 68a *et seq.*

"relevancy." In the present case, the Bureau caused subpoenas to be issued to fifteen of the officers, employees, and former employees of the Petitioners. The Enforcement Branch obtained these subpoenas simply upon application. By contrast, the Hearing Examiner refused to issue subpoenas to eight Board employees requested by Petitioners because they did not first establish need and relevancy to his satisfaction (see App. to Petition, p. 8a).

Petitioners submit that Rule 19(g) is inconsistent with Section 12 of the A.P.A. (5 U.S.C. § 1011) which provides that "Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons." No "law" can be cited to support the discriminatory procedure established by Rule 19(g). The legislative history of the A.P.A. evidences Congressional intent that an administrative agency should not enjoy special privileges and exemptions denied to private citizens when the agency is engaged as a prosecutor or plaintiff in a quasi-judicial proceeding. (See Sen. Doc. No. 248, 79th Cong., 2d Sess. pp,. 324, 371 (1946)).

In sum, Petitioners were foreclosed from obtaining testimony by Board employees which they felt essential to their defense,[2] and at the conclusion of the proceeding the Board inflicted an economic death sentence. Whether or not an administrative agency is required by the Fifth Amendment to provide private parties with compulsory process. we submit it is clear

[2] Petitioners were not interested in obtaining testimony of a confidential character. The record shows that Petitioners were interested primarily in eliciting testimony respecting certain activities of Petitioners themselves which had been directly observed by Board employees whom Petitioners wished to call (see Petition, p. 16).

that once subpoena rights are granted they cannot be accorded on a basis which discriminates so harshly in favor of the prosecution and against the respondent in the administrative proceeding.

Petitioners respectfully submit that the issues raised are of general importance in the conduct of administrative proceedings. The right of private-party respondents to summon agency employees and investigators as witnesses in administrative hearings is a recurrent and troublesome issue which should be clarified by this Court. The decision below not only countenances an exacting standard for securing such testimony, but if allowed to stand it will also encourage discriminatory treatment of private-party respondents.

2. The Decision Making Procedure Followed by the Board Should Be Reviewed By This Court

There is a substantial question whether the Civil Aeronautics Board rendered a decision in the present case based upon the record, and whether, having arrived at a result without reference to the record, the Board assigned subordinates the task of preparing findings and an opinion to rationalize its decision.

The Administrative Procedure Act contemplates that a decision in an adjudicatory proceeding shall be based upon the record. Section 7(c) (5 U.S.C. § 1006) provides that "No sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party," and under Section 8(b) (5 U.S.C. § 1007) a decision must include a statement of "findings and conclusions * * * upon all the material issues of fact, law, or discretion presented on the record." The Federal Aviation Act vests the decision making authority in the Board itself (49 U.S.C. §§ 1321, 1324).

Petitioners attempted, without success, to engage in discovery proceedings for the purpose of demonstrating that the Board decided this case without considering the record. In any event, the decision making procedure followed by the Board at the time the present case was decided was disclosed by Louis J. Hector in a widely discussed memorandum which he addressed to the President on September 10, 1959. (Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 Yale L. J. 931 (1960).) Hector was a member of the Board when the case at bar was orally argued before the Board, and his memorandum to the President is dated about two weeks before the opinion in the present case was announced by the Board on September 28, 1959 (see App. to Petition, p. 28a).

In his memorandum, Hector pointed out that "In almost every case before the CAB, every significant conclusion of the [hearing] examiner on important issues is challenged by the losing parties, and the appeal procedure to the Board covers every aspect of the case—legal, factual, and policy. The Board, in effect, tries the case all over again, frequently overturning the examiner's conclusions, which are certainly not considered binding and, on major issues, are not even treated as persuasive." (*Op. cit. supra*, at p. 945.) The Board's decisions, Hector explained, are written "by a staff of expert opinion writers after the decision has been made." (*Id.* at p. 947). According to Hector, "*There have been times when the Board made decisions in executive session and then told the opinion writers what answer the opinion should come out with.* Major decisions of the Board have been made in that way. More often the opinion writer sits with the Board when a case is discussed. *There can*

be no real claim, however, that the Board tells the opinion writers in detail what to put in the opinion. The members do not know the detailed facts and statistics until the opinion writers dig them out of the record and present them in an opinion." (*Ibid.*) (Emphasis supplied). Hector stated that he knew of "no case where the opinion writers ever came back to the Board and said the facts in the record of a case simply would not support a substantial decision previously made by the Board." (*Id.* at 948).

Hector further stated: "If the opinions of the Board ~~express what~~ actually goes on in the minds of the deciding members, this is coincidental or the result of the intuition that a good staff can develop over the years." (*Id.* at 947).

The evils inherent in this mode of decision making have been perceptively described in the following words (Westwood, *The Davis Treatise: Meaning to the Practitioner*, 43 Minn. L. Rev. 607 (1959)):

> "The agency members meet, when the case stands submitted, and vote on the case. The opinion writing section then prepares an opinion—with a minimum of instruction, or none, from the agency as to what it is to contain—in support of the result dictated by the vote. Naturally the opinion is written with a view to making that result stand up in a reviewing court. The opinion writers comb the record and the briefs to marshal all the facts and argument they can find in support of the result they have been told to justify; the facts and argument to the contrary are examined only with a view to meeting possible attack on the result in a reviewing court.
>
> "Thus, instead of the decision of a case being based upon the findings of fact and determinations

of policy disclosed in the agency opinion, the findings and determinations are based upon the decision.

"This inversion makes a complete mockery of the limited judicial review of agency actions as the courts have rationalized it. For judicial review is limited on the theory that an agency has first ascertained what it believes the facts to be, then has made determinations of policy, and from those facts and policy has arrived at the decision. If the appellate courts really faced up to the facts of life—that is that the agency first decides what result it wants and then facts and policy are found by its staff to fit the result—the present theory of judicial review would have to be scrapped. Reviewing courts, conceivably, might still arrive at a similar limitation on their review; but they certainly would have to rationalize it differently.

"The facts of life I have described are well known, certainly among practitioners and agency members and staffs, even though sometimes only grudgingly admitted." (*Id.* at 613)

* * *

"The administrative process as it really is means that practitioners and clients spend an inordinate amount of time and money building up huge records, with meticulous research and great ingenuity, which are finally examined, for the purpose of making 'findings' and 'determinations,' only with an eye to justifying a result already arrived at. What actually prompts the result—*i.e.*, the votes of the agency members—may be a newspaper story, or a vague impression based upon the oral argument (which is usually ridiculously brief as compared with the vast records in so many of these cases), or some general preconceptions, or (possibly) a reading of briefs, or extra-record pressure—especially from members of Congress—or

goodness knows what. One thing that all too often does *not* prompt the result is the record so laboriously and expensively compiled, or the facts demonstrated therein which the agencies are supposed to find with such highly respected 'expertise.'" (*Id.* at 614)

* * *

"As I have indicated, I fully recognize the need, indeed desirability, of staff advice and assistance to the agency in decision making. But that is very different from having the agency decide a case for various reasons, good or bad, and then having the opinion—*i.e.*, the findings and determinations according to which the decision is to be supported—written by a lawyer-opinion-writing section which is simply writing a brief to the appellate courts in support of the decision otherwise arrived at. That process means that decisions can be reached irresponsibly, with the deciders never having to think through their rationalization, never having to examine their conclusion in the light of any logical relationship to the record. They can get away with voting in accordance (for instance) with the whispered advice of a politician because they do not have to justify their vote; their skilled lawyer-opinion-writers will write a brief for them which will provide the necessary support for the purposes of a judicial review that is satisfied if 'some' evidence in the huge records can be made to point to the 'findings.' It is this irresponsibility, flowing from the separation of deciding and rationalizing, that opens the way to 'influence,' to incredible inconsistencies, and to downright superficial or even thoughtless decision of matters involving millions of dollars." (*Id.* at 615)

Petitioners do not contend that the Board cannot utilize assistants before reaching a decision (see *United States* v. *Morgan*, 313 U.S. 409), or that it is pre-

cluded from using assistants in preparing its opinions once a decision is reached. But clearly the requirement imposed by the A.P.A., that the Board must render a decision *"upon consideration of the . . . record"* is sapped of all vitality if the procedure described by Hector is sanctioned.

CONCLUSION

For the reasons discussed in the petition for certiorari and in this petition for rehearing, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Dated: November 17, 1961

Certificate of Counsel

I, ABE KRASH, an attorney for Petitioners, hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and that the Petition is restricted to the grounds specified in Rule 58 of the rules of this Court.

ABE KRASH

Counsel for Petitioners